TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 664.

JAMES M. TOWNSEND, APPELLANT,

vs.

ALFRED TODD AND PHILANDO ARMSTRONG, ASSIGNEES OF GEORGE T. NEWHALL, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED OCTOBER 11, 1875.

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2 ALFRED TODD ET AL., ASSIGNEE OF THE estate of George T. Newhall, bankrupt,
vs.
JAMES M. TOWNSEND.

To the honorable the Supreme Court of the United States:

The appeal of James M. Townsend, the above-named defendant and appellant, respectfully showeth—

That, upon the 26th day of February, A. D. 1874, the above-named complainants filed their bill in the district court of the United States for said district of Connecticut, against the above-named defendant and appellant, to set aside a mortgage upon the real estate of said Newhall, bankrupt, given by him to the defendant to secure a note for fifty thousand dollars of said Newhall, payable to the order of said Townsend as trustee, and praying for a decree that said mortgage be released and said mortgage-note be delivered to said assignees to be can-
3 celed; that an *an* answer to said bill was filed by said defendant and appellant, and thereafter said cause proceeded to hearing and trial; that on the eight' day of September, A. D. 1874, a final decree was made and pronounced in the cause, wherein it was in substance adjudged and decreed that the said mortgage should be set aside, but leaving said defendant and appellant to prove his claims against said estate of said bankrupt as a general creditor; whereupon the said defendant, in due form of law, appealed from said decree of said district court of the United States to the honorable circuit court of the United States for the second judicial circuit, and said appeal having been duly entered and filed in said circuit court, such proceedings were had therein, that at a stated term of said court held at New Haven, in the district of Connecticut, on the third Tuesday of April, A. D. 1875, said decree of said district court was affirmed, and on the 4 day of May, A. D., 1875, a final decree was made and pronounced in the cause, wherein
in was in substance adjudged and decreed that the said mort-
4 gage should be set aside, but leaving said defendant and appellant to prove his claims against said estate of said bankrupt as a general creditor.

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the cause, may be sent to the Supreme Court of the United States without delay, and that said Supreme Court will proceed to hear said cause anew, and that the said decree of the circuit court may be reversed and every part thereof, and a decree made dismissing said bill with costs, or such other decree as to the said Supreme Court shall be just.

Dated at New Haven this 10 day of May, A. D. 1875.

JAMES M. TOWNSEND,
By his Solicitor, JNO. S. BEACH.

5 Supreme Court of the United States.

ALFRED TODD ET AL., ASSIGNEES OF THE ESTATE of Geo. T. Newhall, bankrupt,
vs.
JAMES M. TOWNSEND.

Know all men by these presents that we, Walter Osborn, Jared F.

Redfield, & Tilton E. Doolittle, in said district, are held and firmly bound unto Alfred Todd and Philando Armstrong, of said New Haven, assignees of the estate of George T. Newhall, bankrupt, in the sum of one thousand dollars, to be paid to the said Todd and Armstrong or their successors in said office; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this tenth day of May, 1875.

6 Whereas the above-named James M. Townsend hath taken an appeal to the Supreme Court of the United States to reverse the decree pending in the above-entitled cause by the circuit court of the United States for the district of Connecticut:

Now, therefore, the condition of this *alle*gation is such that if the said James M. Townsend shall prosecute his appeal to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WALTER OSBORN. [SEAL.]
TILTON E. DOOLITTLE. [SEAL.]
JARED E. REDFIELD. [SEAL.]

By the Hon. Nathaniel Shipman, one of the judges of the circuit court of the United States for the district of Connecticut.

To Alfred Todd and Philando Armstrong, assignees in bankruptcy of George T. Newhall, bankrupt:

7 Whereas James M. Townsend, of New Haven, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Connecticut, in favor of you, the said Todd and Armstrong as aforesaid, and has filed the security required by law: You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, A. D. 1875, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New Haven this 10th day of May, A. D. 1875.

N. SHIPMAN,
One of the Judges of the Circuit Court of the U. S. for Dist. of Connecticut.

NEW HAVEN, *May* 10, 1875.

Due and legal service of the within citation is hereby acknowledged
SIMEON E. BALDWIN,
Solicitor for Appellees.

8 The bill, answer, pleadings, depositions, evidence, and proceedings whereof mention is made in the foregoing appeal follow in these words, viz:

JAMES M. TOWNSEND
vs.
TODD & ARMSTRONG, ASSIGNEES.

Be it remembered that on the 15th day of September, A. D. 1874,

there was filed in this court a transcript of record from the district court in the words following, viz:

9 ALFRED TODD ET AL., ASSIGNEE OF the estate of George T. Newhall, bankrupt,
vs.
JAMES M. TOWNSEND.

To the hon. the circuit court of the United States of the district of Connecticut:

The appeal of James M. Townsend, the above-named defendant and appellant, respectfully showeth:

That, upon the 26th day of February, A. D. 1874, the above-named complainants filed their bill in the district court of the United States for said district of Connecticut against the above-named defendant and appellant, to set aside a mortgage upon the real estate of said Newhall, bankrupt, given by him to the defendant to secure a note of fifty thousand dollars of said Newhall, payable to the order of said Townsend as trustee, and praying for a decree that said mortgage be released and said mortgage note be delivered to said assignees to be canceled; that an answer to said bill was filed by said defendant and appellant, and thereafter said cause proceeded to hearing and trial; that on the day of September, A. D. 1874, a final decree was made and pronounced in the cause, wherein it was in substance adjudged and decreed that the said mortgage should be set aside, but leaving said defendant and appellant to prove his claims against said estate of said bankrupt as a general creditor.

Wherefore, this appellant appeals from the whole of said decree
10 of said district court of the United States, and respectfully prays that the decree of said district court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the cause may be sent to the circuit court of the United States for said district without delay, and that said circuit court will proceed to hear said cause anew, and that the said decree of the district court may be reversed, and every part thereof, and a decree made dismissing said bill, with costs, or such other decree as to the said circuit court, shall seen just.

Dated at New Haven this 10th day of September, A. D. 1874.

JNO. S. BEACH,
Solicitor for Defendant and Appellant.

Circuit court of the United States for the district of Connecticut.

ALFRED TODD ET AL., ASSIGNEES OF THE ESTATE of George T. Newhall, bankrupt,
vs.
JAMES M. TOWNSEND.

Know all men by these presents that we, James M. Townsend, of East Haven, in said district, and George B. Bassett, of the city and county of New Haven, in said district, are held and firmly bound unto Alfred Todd and Philando Armstrong, of said New Haven, assignees of the estate of George T. Newhall, bankrupt, in the sum of one hundred and forty dollars, to be paid to the said Todd and Armstrong or their successors in said office, to which payment well and truly to be made

11 we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 10th day of September, A. D. 1874.

Whereas the above-named James M. Townsend hath taken an appeal to the circuit court of the United States for the district of Connecticut, to reverse the decree pending in the above-entitled cause by the district court of the United States for said district:

Now, therefore, the condition of this allegation is such, that if the said James M. Townsend shall prosecute his appeal to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

JAMES M. TOWNSEND. [L. S.]
GEORGE B. BASSETT. [L. S.]

Signed, sealed, and delivered in the presence of—
JOHNSON T. PLATT.
CHARLES J. ORT.

HARTFORD, CONN., *Sept. 10th*, 1874.

The foregoing bond is approved and the appeal allowed.

N. SHIPMAN,
District Judge.

By the Hon. Nathaniel Shipman, one of the judges of the circuit court of the United States for the district of Connecticut.

To Alfred Todd and Philando Armstrong, assignees in bankruptcy of George T. Newhall, bankrupt:

Whereas James M. Townsend, of New Haven, has lately ap-
12 pealed to the circuit court of the United States for the district of Connecticut from a decree lately rendered in the district court of the United States for the district of Connecticut in favor of you, the said Todd and Armstrong, assignees as aforesaid, and has filed the security required by law: You are therefore hereby cited to appear before the said circuit court at its term next to be held at Hartford, in said district, on the third Tuesday of September, A. D. 1874, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at Hartford aforesaid, the 4th day of July, A. D. 1874.

N. SHIPMAN,
One of the Judges of the Circuit Court for the District of Connecticut.

NEW HAVEN, CONN., *Sept. 10th*, 1874.

Due and legal service of the within citation is hereby acknowledged.

TODD & ARMSTRONG,
Assignees, etc.
By S. E. BALDWIN,
Their Attorney.

The bill, answer, pleadings, depositions, evidence, and proceedings

whereof mention is made in the foregoing appeal follow in the words and figures following, viz:

ALFRED TODD ET AL., ASSIGNEES, ETC.,
vs.
JAMES M. TOWNSEND.
} In equity.

Be it remembered that heretofore, to wit, on the 26th day of February, A. D. 1874, there was filed in this court a bill in equity in the words following, viz:

To the honorable Nathaniel Shipman, judge of the district court of the United States for the district of Connecticut:

Alfred Todd and Philando Armstrong, of town of New Haven, in said district, assignees of George T. Newhall, of said town, bankrupt, bring this bill of complaint against James M. Townsend, of the town of East Haven, in said district.

And thereupon your orators complain and say that at said town, on the 12th day of April, 1873, the said George T. Newhall signed and delivered to said defendant a promissory note for the sum of fifty thousand dollars, payable on demand to the order of James M. Townsend, trustee, with seven per cent. interest, payable semi-annually in advance, together with all taxes assessed upon said sum against said grantee or the holder of said note, which said note was dated on said day and year; and that then and there said George T. Newhall, being seized and possessed of sundry parcels of real estate in said town, comprising his homestead upon Argyle street, his factory property upon Newhall street, his upper factory property upon Thompson street, and large tracts of unimproved lands, in all worth over one hundred thousand dollars, executed and delivered to said defendant a mortgage-deed, conveying said lands and all improvements thereon to James M. Townsend, to have and to hold in fee-simple to James M. Townsend, trustee, and his heirs forever, subject to certain prior incumbrances, upon condition that if the said note were paid according to its tenor said deed should be void; which mortgage-deed was duly attested and acknowledged and thereafter recorded in the land records of said town of New Haven, volume 282, page 182, to which record reference is hereby made for a more particular description of said mortgaged premises.

And your orators further complain and say that they are informed and believe, and therefore aver, that at the date and delivery of said note and mortgage said George T. Newhall was not indebted to any
14 person or corporation for which the said defendant was trustee, in any manner whatever, for any sum which could have been secured by said note; and that if there was any trust created by said note and mortgage, it was trust for the benefit of said George T. Newhall only.

And your orators further complain and say that said note is still outstanding and in the hands of said Townsend, and that he also holds said mortgage-title.

And your orators further say that on the 29th day of September, 1873, said George T. Newhall filed in this court a petition in bankruptcy, and that such proceedings were thereafter had thereon that afterwards, to wit, on the 4th day of October, 1873, he was duly adjudicated a bankrupt thereon; and your orators were duly appointed and qualified as his assignees in bankruptcy, and received a conveyance in due form of law

of all his assets, as by the record of said proceedings in this court remaining more fully appears.

And your orators further complain and say that said mortgaged premises have been conveyed to them by such assignment in bankruptcy; they have requested said defendant, and particularly at said term, on the 17th day of February, 1874, to release to them his title under said mortgage, but that he then and there refused so to do, and that they have no adequate remedy at law, and that said mortgage is a cloud upon their title as such assignee.

Your orators therefore pray that this honorable court will consider their complaint, and, on finding the same to be true, will order the said James M. Townsend, under a suitable penalty, to release to them as such assignees his said mortgage-title, under said mortgage to him as trustee, and to deliver up to them said mortgage-note to be canceled, and will grant such other relief as to equity may pertain.

And may it please your honor to grant unto your orators a writ of subpœna, issuing out of and under the seal of this honorable court, directed to said James M. Townsend, the defendant, commanding him,
on a day therein named, to appear before this court and answer
15 unto all and singular the premises, and abide the order of the court thereon.

And your orators will ever pray.

SIMEON E. BALDWIN,
Solicitor, and of Counsel for Complainants.

DISTRICT OF CONNECTICUT, *ss., New Haven:*

Alfred Todd and Philando Armstrong, being duly sworn, depose and say, that they are the complainants in said foregoing bill, and have read it and know its contents, and that the said bill is true, except as to those matters therein stated on information and belief, and that as to those matters they believe them to be true.

ALFRED TODD.
PHILANDO ARMSTRONG.

Sworn to before me this 23d day of February, 1874.
[SEAL.] JULIUS TWISS,
Notary Public.

And on the same day a writ of subpœna issued out of said court, directed to the respondent named in said bill, which was duly served and returned, and which, with the return of service endorsed, is in the words and figures following, viz:

The President of the United States of America to the marshal of the district of Connecticut, sendeth greeting:
SEAL.]

You are hereby commanded to summon James M. Townsend, of East Haven, in the State and district of Connecticut, to appear before the judge of the district court of the United States of America for the district of Connecticut, in the second circuit, in equity, on the
16 first Monday of April, 1874, wheresoever the said court shall then be, to answer a bill of complaint exhibited against said James M. Townsend, in said court, by Alfred Todd and Philando Armstrong, both of the town of New Haven, in said district, assignees in

bankruptcy of George T. Newhall, bankrupt, and then and there to answer the same, and to do and abide by what said court may order and decree in the premises.

Make due service and return at least twenty days before said first Monday of April, 1874.

Witness the Hon. Nathaniel Shipman, judge of the district court of the United States, at Hartford, this 26th day of February, A. D. 1874.

LOREN P. WALDO, *Clerk.*

The defendant is required to enter his appearance in said cause, in the clerk's office of said court, on or before the day at which this writ is returnable, or by the rules of said court said bill will be taken as confessed.

LOREN P. WALDO, *Clerk.*

S. E. BALDWIN, *New Haven, Conn.,*
Complainants' Solicitor.

United States of America, district of Connecticut.

NEW HAVEN, *February 27th*, 1874.

Then and there I left a true and attested copy of the within writ in the hands of the within-named James M. Townsend.

Travel	$2 00
Service	2 00
Copy	75
Return to court	4 00
	$8 75

Attest:

P. R. CARLL,
U. S. Marshal for the District of Connecticut.

17 And on the 17th day of March, A. D. 1874, John S. Beach, of New Haven, entered appearance for the respondents, and on the 13th day of June, A. D. 1874, filed in court his answer, in the words and figures following, viz:

United States district court, district of Connecticut.

ALFRED TODD ET AL.
vs.
JAMES M. TOWNSEND.

The answer of James M. Townsend, defendant, to the bill of complaint of Alfred Todd and Philando Armstrong, assignees of George T. Newhall, bankrupt.

The defendant, now and at all times hereafter reserving to himself all benefit of exception which may be had or taken to the manifest errors, uncertainties, imperfections, and insufficiencies in the said bill of complaint contained, for answer thereto, or to so much thereof as he is advised it is material or necessary for him to make answer unto, answering, says:

That on the 12th day of April, 1873, the said George T. Newhall exe-

cuted a promissory note of the tenor described in said bill, and also executed and delivered to the defendant a mortgage-deed of sundry parcels of real estate in said town of New Haven, comprising his factory property upon Newhall street, his upper factory property upon Thompson street, and certain tracts of unimproved lands, but not including his homestead upon Argyle street, as alleged in said bill, as security for the payment of said note according to its tenor, and said mortgage-deed was duly attested, acknowledged, and recorded, as set forth in said bill.

18 And the defendant avers that said note was executed and said mortgage-deed was executed and delivered in pursuance of an agreement then made between the defendant and the said Newhall, by which the said note was to remain in the custody and control of Henry D. White, esq., until the said defendant had advanced to the said Newhall such securities as they might agree upon to the amount of forty thousand dollars, and when said advances had been made to that amount the said note was to be delivered to the defendant, and the said defendant was to release and quitclaim certain other mortgage liens he held upon the real estate of said Newhall, to the amount of ten thousand dollars, and if no agreement as to said securities to be advanced by the said defendant to said Newhall was arrived at between said parties, the said White was to endorse forty thousand dollars as paid upon said note, and by as much as the securities advanced fell short of said sum of forty thousand dollars, the said White was to endorse as paid upon said note the sum represented by such deficiency. The defendant, further answering, says that in pursuance of said agreement said note was left in the hands of the said Henry D. White, esq.; that the only object and purpose of said arrangement was in the hope and expectation that the said Newhall would be thereby enabled to make settlements with his creditors, and continue his business to their mutual benefit; that to this end and in pursuance of said arrangement the said defendant, immediately after the execution of said note and the execution and delivery of said mortgage, to wit, on the 15th day of April, 1873, assumed upon himself and subsequently and before the bankruptcy of the said Newhall, paid certain liabilities of the said Newhall, to the amount of sixteen hundred and sixty-three $\frac{2}{100}$ dollars, and the defendant in like manner, and in pursuance of said arrangement, on the 11th day of July, 1873, advanced and paid to the said Newhall in cash the sum of two hundred and ten dollars, and in like manner, and in pursuance of said agreement, on the 21st day of July, 1873, he advanced and paid to the said Newhall in cash the

19 sum of five thousand dollars; that all these payments and advances were made in sole reliance upon the security of said mortgage, and at the times respectively when made, it was fully understood and agreed by said Newhall that they were made by the defendant and received by said Newhall upon the faith of and in reliance upon said mortgage security.

And the defendant insists and claims that he has a valid lien upon the real estate described in said mortgage-deed, to the extent of six thousand eight hundred and seventy-three $\frac{2}{100}$ dollars, with the interest thereon from the times, respectively, when said several sums of money were advanced and paid by him as aforesaid, and he is ready and willing, and hereby offers upon payment of the amount of said lien, to release to the said complainants said mortgage title, and to unite with them in a request to the said White to deliver up said note of fifty thousand dollars to be canceled. And the defendant admits the appointment and qualifications of said complainants as assignees in bankruptcy of said Newhall, as alleged in said bill, and denies that any other matter or

thing in said complainants' bill contained and not herein and hereby well and sufficiently answered, admitted, traversed, or denied, is true to the knowledge and belief of the defendant, and he respectfully submits to this honorable court that the complainants have no right to the relief prayed for in said bill.

All which matters and things the defendant is willing to aver, maintain, and prove as this honorable court shall direct, and he prays to be hence dismissed with reasonable costs and charges in this behalf most wrongfully sustained.

JAMES M. TOWNSEND.

JNO. S. BEACH,
Of Counsel.

UNITED STATES OF AMERICA,
New Haven, District of Connecticut, ss:

James M. Townsend, being duly sworn, deposes and says that he
20 has read the foregoing answer, and is acquainted with the contents thereof; that as to all matters therein stated to be true to the knowledge of the defendant, the same are true, and as to those stated to be on information and belief, he verily believes the same to be true.

JAMES M. TOWNSEND.

Sworn to this fifteenth day of May, A. D. 1874, before me.

JOHNSON T. PLATT,
U. S. Commissioner.

And on the 30th day of May, A. D. 1874, the complainants filed their replication in said cause in the words and figures following, viz:

In the district court of the United States, in the district of Connecticut.

ALFRED TODD AND PHILANDO ARMSTRONG, assignees in bankruptcy of George T. Newhall, bankrupt, complainants, *vs.* JAMES M. TOWNSEND, DEFENDANT.	In equity.	No. 288.

The replication of said complainants to the answer of said defendant.

These repliants, saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage
21 of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain, and prove the said bill of complaint of these repliants to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct; and humbly pray, as in and by said bill they have already prayed.

SIMEON E. BALDWIN,
Solicitor for Complainants.

And said cause having been continued at the May term, 1874, came on for trial in vacation, by consent of the parties; and having been fully heard thereafter, on the 18th day of July, 1874, the court filed its finding of facts and opinion as follows, viz:

District court of the United States for the district of Connecticut.

ALFRED TODD ET AL., ASSIGNEES OF THE ESTATE of George T. Newhall,
vs.
JAMES M. TOWNSEND.
} No. 288.

This is a bill in equity, brought by the plaintiffs as assignees of
22 the estate of George T. Newhall, a bankrupt, against James M. Townsend, to set aside a mortgage upon the real estate of said Newhall, given by him to the defendant to secure a note of $50,000 of said Newhall, payable to the order of said Townsend, as trustee, and praying for a decree that said mortgage be released, and said mortgage-note be delivered to said assignees to be cancelled.

Upon the trial of said cause, the following facts are found to be proved and true:

That said Newhall was, on October 4th, 1873, adjudicated a bankrupt by this court upon his own petition, filed September 29th, 1873. The petitioners were duly appointed and qualified as his assignees in bankruptcy, and received a conveyance in due form of law of all his assets from the proper officer.

Prior to April 12th, 1873, said Newhall had been greatly embarrassed in his business, and on said day was largely indebted to various persons and corporations, which debts he was unable to pay as they matured in the ordinary course of business, and was insolvent within the meaning of the bankrupt-act. His entire indebtedness was at least the sum of $73,000. He was on said day indebted to said Townsend and to the Townsend Savings-Bank in the sum of $31,704.13. Said bank also held, in addition, a note of $7,500 of said Newhall to the order of said Townsend, and endorsed by him, without recourse, to Russell Chapman, secured by mortgage upon the estate of said Newhall, which $7,500 note was held by said bank as collateral security for a $7,000 note of said Chapman and others, discounted by said bank for the benefit of said Chapman.

On said Aprll 12th, 1873, said Newhall obtained from Treadwell Ketchum a loan of $45,000, secured by mortgage upon his real estate in New Haven, Connecticut.

From the avails of said loan said Newhall paid sundry debts, and among others paid said savings-bank and said Townsend the sum of $29,204.13, leaving due to said Townsend the sum of $2,500, due upon a previous note of $10,000, and secured by prior mortgages. The
23 entire indebtedness of said Newhall to said savings-bank was extinguished by this payment, except said $7,500 mortgage-note, called, for the sake of convenience, the Chapman note and mortgage; and said bank quit-claimed all the mortgages which they held against the said Newhall, except the Chapman mortgage.

There were now existing upon the various parcels of said Newhall's real estate, the Chapman mortgage, two mortgages to said Townsend, upon which was due the sum of $2,500, and said mortgage to said Ketchum to secure said $45,000.

I do not intend to find that there were no other mortgages upon said

Newhall's estate; but these were all concerning which evidence was introduced upon the trial of this case.

Said Newhall was still indebted to sundry persons in the sum of at least $27,000—the precise amount was unknown—and was desirous to be relieved from his debts, and pay his creditors. Said Townsend, who was the president of the Townsend Savings-Bank, had previously befriended said Newhall in his pecuniary embarrassments, and was now desirous of assisting him still further and enabling him to avoid bankruptcy; and now proposed to said Newhall to execute a note to him, (said Townsend,) of that date, to wit, April 12th, 1873, in the sum of fifty thousand dollars, payable on demand to the order of said Townsend, as trustee, with seven per cent. interest, payable semi-annually in advance, together with all taxes to be assessed upon said sum, and to be secured by mortgage of all his real estate in said New Haven, except his homestead; and that he (the said Townsend) would endeavor to borrow money, or to borrow available securities, or might lend him money, or furnish him pecuniary assistance in some way, which money or securities were to be paid to said Newhall's creditors, in satisfaction of their debts. The repayment by Newhall of the money or securities so borrowed was to be secured by said $50,000, note and mortgage.

Said Townsend was under no obligation to raise any particular
24 amount of money, or to advance any money, and no definite plan was matured in his own mind, or in that of Newhall, as to the manner in which this pecuniary aid was to be obtained or furnished, or the amount which said Townsend might be able to obtain, or which it might be necessary to obtain. The only proposition definitely agreed on between said parties in regard to the money to be advanced upon said note was that said Newhall should execute the note and mortgage before mentioned, and deliver the same to H. D. White, esq., and that by the aid of that mortgage said Townsend might thereafter raise money, or its equivalent, for Newhall's benefit, or might loan him money himself, which money, or its equivalent so loaned, was to be secured by said note and mortgage.

Said note, as hereinbefore described, was executed by said Newhall on said April 12th, 1873, and on the same day a mortgage upon his real estate in New Haven, excepting his homestead, was duly executed, which note and mortgage was delivered to Henry D. White, esq., the conveyancer who drew the same, for safe-keeping, and said mortgage was recorded in the land-records of said town of New Haven, volume 282, page 182.

If said Townsend was unable to effect any such loan, or to render any pecuniary aid, then it was understood that the sum of $40,000 was by said White to be endorsed upon said note as paid, and deliver the note to said Townsend, leaving due $10,000 thereon, which was intended to represent the $7,500 Chapman note and mortgage, and the $2,500 Townsend debt, and to be security therefor. If any advancements were made upon this note, not amounting to $40,000, said White was so to endorse payment upon the note, that the amount apparently due upon the note should represent the amount advanced by the lender of the money, and said $7,500 Chapman mortgage and said $2,500 Townsend debt, unless the same were paid from the money so advanced, and deliver the note to said Townsend.

Said White still retains the note and mortgage, and has made no endorsements.

25 Said Townsend did not obtain or borrow money or securities from any third person upon the faith of this mortgage.

On April 15th, 1873, T. W. Dawson & Co., creditors of said Newhall, threatened that they would throw him into bankruptcy, if their debt was not paid or secured. Said Townsend endorsed four notes of said Newhall, who delivered the same to said Dawson & Co., in payment of their debt. Said notes were for $529.26, $331.44, $534.60, and $537.72, respectively. Of these four notes said Townsend has paid the sum of $1,663.02; said Newhall paid the sum of $470.

Said indorsement of said Dawson & Co. notes was made by said Townsend, believing that he was secured against such liability by said mortgage.

On July 21st, 1873, said Townsend paid $5,000 to L. E. Munson, esq., who acted as attorney for said Newhall, and informed said Townsend that the sum of $5,000 must be paid to pressing creditors of said Newhall, and that such payment would save him from bankruptcy. Said $5,000 was paid to certain creditors. Said Townsend advanced this money upon the faith of said mortgage, and was informed and believed that such advance was secured thereby. Said Townsend also loaned said Newhall $200 on July 11th, 1873, upon the faith of this mortgage.

Said Townsend knew that said Newhall was insolvent, but did not have reasonable cause to believe that the said $50,000 mortgage was made with a view to defeat the object of the bankrupt act, or unlawfully to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under said act, or to evade its provisions, or to violate any of the provisions of the 35th section of the said act.

The conclusions of law which I think are deducible from the foregoing facts are:

First. That the mortgage-deed of $50,000 is void as against the creditors of Newhall, because, first, it is in violation of the spirit and policy of the statutes and recording system of Connecticut; and, secondly, is a constructive fraud upon creditors.

26 The decision of the supreme court of Connecticut in regard to the validity of similar mortgages have been frequent, and the principles laid down by the various decisions have been uniform, although, in the application of these principles, the strictness of the early cases has been much relaxed.

In Pettibone v. Griswold, 4 Conn., 161, the court says: "It is the policy of all laws, and experience has demonstrated the wisdom of it, that the titles to real estate should be registered for the benefit, not of parties, but of creditors and all others interested. All grants and mortgages of houses and lands shall be recorded at length by the town clerk, and no deed shall be accounted good and effectual to hold such houses and lands against any other person or persons but the grantor or grantors and their heirs only, unless recorded as aforesaid. (Stat., 302, sec. 9.) It is the object of this law to prevent fraud and give security and stability to title. It results, unquestionably, that the condition of a mortgage-deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make inquiry in pais concerning the liens on the property of his debtor, but, on application to the record, he may acquire all the information which his interest demands. At least he must have the power of knowing from this source the subject-matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And, what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything

which a fraudulent grantor may devise to shield himself from the demands of his creditors."

So in Hart v. Chalker, 14th Conn., 79:

"Our recording system, in its spirit, requires that the record should disclose, with as much certainty as the nature of the case will admit of, the real state of the incumbrance upon the property. And all the authorities concur in this result, that reasonable notice of the incumbrance should be given by the record. What is reasonable notice in
27 certain cases has been a question. Certain points, however, we think are settled; that if a mortgage is given to secure an ascertained debt, the amount of that debt ought to be stated; that if it is intended to secure a debt not ascertained, such data must be given respecting that debt as will put any one interested in the inquiry upon the track leading to a discovery; and if given to secure an existing or a future liability, the foundation of such liability must be set forth. Thus the record is made to show the real state of the title, so far as it can be known, and as little room as possible is left for the substitution of fictitious claims."

The same rule is applied in Merrills v. Swift, 18 Conn.; Bacon v. Brown, 19 Conn., 29, and in various other cases familiar to the profession. It is not denied in Potter v. Holden, 31 Conn., 385.

As truly stated in Merrills v. Swift, "the general principle established with respect to mortgages is, that to render them valid against creditors and purchasers they must give reasonable notice of the incumbrances created by them."

The question then is, does this mortgage disclose with as much certainty as the nature of the case will admit, or with reasonable certainty, the real state of the incumbrance upon the property? Was reasonable notice of its nature and amount given to the creditors of Newhall?

The mortgage was actually given to secure monies which might thereafter be loaned by Townsend or some other person, or to secure the loan of securities made by Townsend or some other person to Newhall, the amount to be required being unknown. No agreement was made for a loan, and no obligation rested upon anybody to advance money. There was an indefinite expectation on the part of Townsend that he might be able to assist Newhall in some way. There was a similar hope in the mind of Newhall that he might receive aid.

The mortgage was actually given to secure a note of $50,000, payable on demand, with seven per cent. interest, payable semi-annually, and the payment of all taxes thereon.
28 It is difficult to conceive of a mortgage which should give less accurate information of the real transaction.

No creditor could, by any possibility, be led to infer from any inspection of this mortgage, purporting to be for a note of $50,000 actually due, that it was to secure any amount of future advances within $50,000 which might thereafter be made by any number of persons.

Again, mortgages which conceal the real nature of the incumbrance are declared void as against creditors, because they are constructively, although not actually, fraudulent.

"Legal or constructive fraud includes such contracts or acts as, although not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law."

1st Bouvier, 612, (3.)

The object of recording deeds is to disclose the actual state of the title, so that all parties may have as accurate information as the nature

of the case will admit, both of the title and of the pecuniary condition of the grantor.

The record of an incumbrance of $50,000 upon all the mortgagor's real estate, when the actual transaction was a mortgage to secure future advances, would inevitably tend to mislead the creditors. If the real nature of the agreement was discovered upon the record, he could easily learn at any time the exact state of the incumbrance. By attachments he could prevent future advances till his own debt was secured. By a petition in bankruptcy he could prevent future payment to favored creditors. He is necessarily led to a false conclusion, unless he disbelieves or distrusts the record, and of the verity of a public record there should be no distrust. Therefore, while our courts have generally placed their decisions as to the invalidity of such mortgages upon the proper construction which should be given to our statutes, it is none the less true that the reason for giving a rigid construction, and thereby declaring the mortgage invalid, has been because such a mortgage was constructively fraudulent, as tending to mislead others, and be-
29 cause a sanction given to conveyances of that character would produce actual fraud in the future. It is against the policy of the law to permit the execution of such conveyances, as it is against its policy to permit the sale of personal property when possession is retained by the vendor.

Thus, in Sanford v. Wheeler, 13 Conn., 165, a case brought by the trustee for creditors to set aside a mortgage-deed which did not accurately disclose the nature of the incumbrance, and in which actual fraud had been negatived by the finding of the superior court, the decision of the Supreme Court evidently recognized the constructively fraudulent character of the transaction. They say, "if the facts found in the present case are only such as have a probable tendency to deceive or mislead, without the malo animo necessary to constitute actual fraud, they may constitute what is sometimes termed a constructive fraud."

The facts which have been found in regard to this mortgage, under this case, pre-eminently are of constructive fraud.

Second. The mortgage must be declared void as well by the Federal as the State courts.

The Supreme Court say, in Chicago City v. Robbins, 2 Black, 428: "When rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the State court; but where private rights are to be determined by the application of common-law rules alone, this court, though entertaining for State tribunals the highest respect, does not feel bound by their decisions."

This is in accordance with Swift v. Tysen, 16 Peters, 1, where the court substantially decide that the Federal courts adopt the construction given by State courts to its public statutes; and when rights and titles to things having a permanent locality are settled by adjudications of State courts, such adjudications are adhered to.

In this case, by the construction given by the State courts to the local statutes, the mortgage was void, and creditors had a right to obtain title to the land mentioned therein by attachment and execution,
30 notwithstanding the existence of the incumbrance. With the statutory system of Connecticut in regard to its real estate, so construed by its courts, the Federal courts will not interfere. Allen v. Massey, 17 Wall., 354.

Third. The mortgage being void as against creditors at the time when the petition in bankruptcy was filed on account of constructive fraud, is void as against the assignee in bankruptcy.

By the bankrupt act of 1867, as soon as the assignee is appointed, the proper officer is directed to assign and convey to the assignee all the estate, both real and personal, of the bankrupt; "and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall" (subject to certain enumerated exceptions) "vest in such assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the date of said proceedings," and all the property conveyed by the bankrupt in fraud of his creditors shall be at once vested in such assignee."

The latter provision vesting in the assignee all property conveyed by the bankrupt in fraud of creditors was not contained in the bankrupt act of 1871.

By the act of 1867, there is vested in the assignee, by virtue of the adjudication, the title to the property conveyed in fraud of creditors. The general term "in fraud of creditors" is used, and includes all fraud, whether actual or constructive or statutory. That this is true appears both from the reason of the statute and from the decisions hereafter cited. I refer also to Bean v. Amsinck, 10 Blatch., 361, a case of constructive fraud, and Allen v. Massey, 17 Wall., 387, a case of statutory fraud.

But it will be observed that the statute vests in the assignee the title to such property only conveyed by the bankrupt as has been conveyed in fraud of creditors. It does not vest the entire title to property conveyed by the bankrupt by a defective conveyance not in fraud of
31 creditors, although creditors might have a legal right to hold such property by levy of execution; neither does it vest in the assignee the entire title to any property of which the legal title is in the bankrupt; but the unrecorded, equitable title is in third persons, provided that equity was not in fraud of the creditors of the bankrupt. For an example of such an equity, I refer to the case of Colt v. Ives, 31 Conn.

The assignee thus represents, under the statute of 1867, not only the bankrupt, but to a certain extent creditors. The mesne attachments of creditors made four months prior to the petition are dissolved, and the title to property conveyed in fraud as against them is at once vested in the assignee, who succeeds to the rights which they would have had at the time when the petition was filed to pursue and obtain such property, and who must solely prosecute the equities which they then had to the fraudulently-conveyed estate.

He does not represent creditors as to all possible rights in property conveyed by the bankrupt, unless such rights grow out of the fraud of the bankrupt, or the laches of the grantee, and this exception would prevent the assignee from recovering property conveyed by an instrument merely defective and not fraudulent. The distinction between the rights of the assignee over the property of the bankrupt which are subject to equities in favor of third persons, neither fraudulent in fact or in law, and the rights of the assignee over property subject to conveyances of the bankrupt which have become constructively fraudulent, plainly appear in the Connecticut cases of Palmer v. Thayer, 28 Conn., 287, and Shipman v. Ætna Ins. Co., 29 Conn., 245.

To this effect is the dictum of Ch. J. Chase In re Wynne, 4 B. R., 5:

"It is to be remembered that the assignee represents the rights of the creditors as well as the rights of the bankrupt, and that any lien or incumbrance which would be void for fraud as against creditors, if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee."

32 The general doctrine is also declared In re Leeland, 10 Blatch., 503. In this case a vendor had sold and delivered to the bankrupt sundry chattels, had taken notes therefore and a mortgage of the chattels, which mortgage was never recorded, as required by the law of the State of New York, in the town where the mortgagor lived, and which, not having been duly recorded, was void as against creditors. The possession of the goods remained in the bankrupt. The vendor claimed from the assignee the proceeds of the chattels, the notes not having been paid. Here it will be observed that the title to the property and the possession were both in the bankrupt. The vendor had no right to the property except the right growing out of the mortgage; and "the statute is the test of the right of the mortgagee. That declares that a mortgage unaccompanied by delivery and a continued change of possession shall be void as against creditors, unless the mortgage was filed as therein prescribed." The mortgage was constructively fraudulent as against creditors, because the possession of the property ever remained in the bankrupt, and no notice having been given of any title in the vendor inconsistent with the possession, as was held in Rood v. Welch, 28 Conn., 157: "The immunity conferred by the statutes upon such property, when properly, mortgaged, in exempting it from a change of possession, did not attach to the property in question, and the retention of possession by the mortgagor therefore rendered the conveyance fraudulent as against creditors."

But the vendors claim that, the mortgage being good as between the immediate parties, they were entitled to reclaim the goods as against the assignees.

Upon this part of the case the court say:

"It is claimed that, because it is valid without being properly filed as against the bankrupts, it is therefore good as against their assignees in bankruptcy, and that no creditor but a judgment creditor can impeach or deny its validity. If it were material, it would be sufficient to say that in this case it is proved that there are judgment-creditors, and that the assignee in bankruptcy is acting herein in their behalf as well as in behalf of all others. But the claim is erroneous on a broader ground. The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee in bankruptcy represents them. He is trustee for them, and whatever right they might assert as creditors, if they had obtained judgments, he may for their benefit assert, whether it be to set aside conveyances by the bankrupts which are fraudulent and void as against creditors, or which are otherwise, as against them, invalid."

33

It is objected that the doctrine that assignees represent creditors as to the property conveyed not in actual fraud is not in accordance with but expressly denied by the decision of the Supreme Court in Gibson v. Worden, 14 Wall., 244.

Although the language of the opinion of the court justifies the conclusion put upon the statute by the counsel for the defendant, I do not think that the decision, when examined with reference to the facts of the case, was intended to vary the doctrine that had been previously laid down In re Wynne and In re Leland.

In Gibson v. Worden a chattel-mortgage was executed on the 8th of March, 1868, to secure a note of the same date. It was recorded upon March 18th, 1868. On September 15th, 1868, a petition in bankruptcy was filed against the mortgagors. The statute of Ohio, where the parties lieved and the property was situated, provides "that every mort-

gage of goods and chattels, where there is no change in the possession of the things mortgaged, shall be absolutely void as against creditors, subsequent purchasers, and mortgagees in good faith, unless the mortgage or a copy thereof shall be forthwith deposited with the proper officer. The supreme court of that State has held that the omission to deposit as directed does not avoid the mortgage in toto, but that whenever deposited it becomes effective from that time.

It is not found that the mortgage was in fact fraudulent under the provisions of the 35th section of the bankrupt act.

34 On the 15th of September, 1868, the date of the petition in bankruptcy, the mortgage was valid as against all parties, and had been valid since March 18th, 1868, the date of the record, and therefore could not be attacked successfully by the assignee. The facts in this case differ entirely from the facts in the Leland case. In the latter, when the petition was filed, no mortgage had been recorded in the proper town. In the Gibson case the mortgage had been duly recorded nearly six months before the petition was filed, and the title of the mortgagee was therefore completed.

The case of Wynne was upon a state of facts somewhat similar to Gibson v. Worden. There the deed of trust complained of was, by the statute of Virginia, void as to creditors until and except from the time it was duly admitted to record. The deed was recorded two days before the passage of the bankrupt act and within four months previous to the commencement of bankruptcy proceedings. The court hold, in substance, that the deed is not void under the 35th section of the bankrupt act, and that if it is valid against creditors under State laws prior to bankruptcy proceedings, the bankrupt act will also recognize its validity.

If a conveyance, although originally void as against creditors, has become valid under the statutes of the State where the property is treated prior to bankruptcy proceedings, and non-attaching creditors have, at the time such proceedings are instituted, no right to attack such conveyances, it is also valid as against the assignee, unless made in violation of the provisions of the 35th section.

The true principle seems to me to be that the assignees take all property formerly of the bankrupt conveyed in actual fraud; also, all property conveyed in constructive fraud, or by a conveyance declared void as against creditors by the statutes or policy of the State where the property is located; provided that at the time of the filing of the petition the creditor had a right by the system or statutes of such State to hold such property by levy of attachment and execution, notwithstanding as between the parties to such conveyance the title so conveyed is valid.

35 A decree should be entered setting aside the mortgage but leaving Mr. Townsend to prove his debt against the estate as a general creditor.

N. SHIPMAN,
District Judge.

And on the 2d day of September, A. D. 1874, the following stipulation as to facts was filed in said cause, viz:

In the district court of the United States for the district of Connecticut.

ALFRED TODD AND PHILANDO ARMSTRONG, assignees in bankruptcy, complainants, *vs.* JAMES M. TOWNSEND, DEFENDANT. } In equity. No. 288. August term, 1874.

In the above-entitled cause, it is agreed by both parties that the findings of the fact contained in the finding and opinion of the judge of said court, filed in said case July 18th, 1874, are correct conclusions from the evidence adduced at the hearing, and that they may be taken as an agreed statement of facts, on which to predicate the final decree in said cause.

SIMEON E. BALDWIN,
Solicitor for Complainants.
JNO. S. BEACH,
Solicitor for Defendant.

36 And on the same day the final decree was made, entered, and filed in court as follows, viz:

In the district court of the United States for the district of Connecticut.

ALFRED TODD AND PHILANDO ARMSTRONG, assignees in bankruptcy of George T. Newhall, bankrupt, complainants, *vs.* JAMES M. TOWNSEND, DEFENDANT. } In equity. No. 288.

At a stated term of said court, held at New Haven on the fourth Tuesday of August, A. D. 1874.

Present, honorable Nathaniel Shipman, judge.

This said above-entitled cause, bearing the docket number two hundred and eighty-eight, (288,) having come on to be heard upon the bill of complaint herein, the answer thereto, and the replication to said answer, and the proof, oral and documentary, taken and filed in said cause, and having been argued by council, and both parties having assented to a certain finding of facts by the judge of said court, filed on the 18th day of July, 1874, as being correct, and agreed that the same might be taken as an agreed statement of facts on which to predicate the decree in said cause:

Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed by the court that the mortgage-note and deed in said bill of complaint described, being a note signed by the said George T. Newhall for fifty thousand dollars, payable on demand to the order of James M. Townsend, trustee, with seven per cent. interest, payable semi-annually in advance, together with all
37 taxes assessed upon said sum against said James M. Townsend, or the holder of said note, and dated April 12th, 1873, and a mortgage-deed conditioned to secure said note, of even date therewith, and executed by said George T. Newhall to James M. Townsend, trustee, in fee, and covering all the real estate then owned by said George T. Newhall in said town of New Haven, except his homestead property, are, and each of them is, as against the complainants, fraudulent in law and

void; and that said James M. Townsend, the defendant, do, within thirty days from the date of the enrollment of this decree, deliver up to the complainants, as such assignees in bankruptcy, said note to be canceled; and also execute and deliver to them, as such assignees, a proper release deed of all interest in any real estate which he derived by virtue of said deed from said George T. Newhall, without prejudice, nevertheless, to the right of said Townsend to prove the several claims in his favor against the estate of said bankrupt which are specified in said finding of facts as a general creditor.

And it is further ordered and decreed that the said complainants do recover of said defendant their costs, charges, and disbursements in this suit, taxed at $59.10.

N. SHIPMAN,
District Judge.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

[L. S.] I, Edwin E. Marvin, clerk of the district court of the United States for the district of Connecticut, do certify that the annexed papers are true copies of the original process, pleadings, proceedings, and decree in the matter of Alfred Todd and others, assignees, against James M. Townsend, on file in said court.

38 In testimony whereof I have set hereto my name officially, and the seal of said court, at Hartford, in said district, this 15th day of September, A. D. 1874.

EDWIN E. MARVIN,
Clerk.

39 And on the same day of the entry of said record John S. Beach, esq., entered his appearance for the appellants, and S. E. Baldwin, esq., entered his appearance for the complainants.

And at the term of said court held at Hartford on the third Tuesday of September, A. D. 1875, the said cause was fully heard upon the arguments of counsel, and thereafter, on the 27th day of April, A. D. 1875, the opinion of the court thereon was filed, in these words, viz:

40 Circuit court of the United States for the district of Connecticut.

JAMES M. TOWNSEND, APPELLANT,
vs.
ALFRED TODD ET AL., RESPONDENd.

WOODRUFF, *Circuit Judge:*

I concur in the opinion pronounced in the court below, that the mortgage in question herein is void as against the creditors of the bankrupt. This seems to me established by the decisions of the courts of the State and to be in conformity with sound principle. In reference to the late cases in the supreme court of Connecticut, relied upon by the appellant, it appears, on a careful examination, that while the court sustained the mortgage then in question as good and valid between the parties, it is carefully stated that the rights of creditors are not involved. (Potter v. Holden, 31 Conn., 385.) It is also noticeable that in the present case the mortgage is not only liable to the objection that, whereas it purports to be given for a present existing debt, due and bearing interest,

41 and specifically described as in and by a definitely mentioned promissory note, it was given and intended not alone as a security for possible future loans or advances, which the mortgage might and

probably expected to make or procure, but which he was not bound by any agreement to make or procure, and in respect to the making or procurement of which no definite plan or mode of proceedure was formed or settled between the parties, but it appears also that it was, as to ten thousand dollars, (part of the sum mentioned therein,) intended as security for other debts already secured by other mortgages; and as to this it was, without any intimation or any circumstance to put creditors upon enquiry, an acknowledgment of indebtedness for twenty thousand dollars, and an incumbrance of real estate to that amount, when the true debt was ten thousand dollars only. On both ground' the mortgage should be held void as a fraud upon creditors, directly tending to deceive, hinder, and delay them.

If void as against creditors, then, upon the grounds stated in re Leland (10 Blatch., 503,) and other cases cited by the district judge, the assignee is entitled to a decree.

The state of my health forbids my entering more fully into a
42 descussion of the arguments most ably presented by the counsel for the appellant.

Let the decree be affirmed with costs.

And on the 4th day of May, A. D. 1875, the final decree in said cause was filed in these words, viz:

43 At a stated term of the circuit court of the United States of America for the district of Connecticut, in the second circuit, held at New Haven, in said district, on the fourth Tuesday of April, in the year of our Lord eighteen hundred and seventy-five.

Present, the honorable Nathaniel Shipman, judge.

JAMES M. TOWNSEND, APPELLANT,
vs.
ALFRED TODD AND PHILANDO ARMSTRONG, assignees in bankruptcy of George T. Newhall, bankrupt, appellees. } In equity.

This cause, having come on to be heard at the term of this court holden at Hartford, in said district, on the third Tuesday of September, in the year eighteen hundred and seventy-four, and having been then argued by counsel before the honorable Lewis B. Woodruff, circuit judge, upon the agreed statement of facts mentioned in the decree of the district court of the United States from which said appeal was taken, was continued for advisement unto this present term, when a written opinion
was filed by said circuit judge, directing that said decree of said
44 district court be affirmed with costs, as by said opinion on file more fully appears; and thereupon, on consideration thereof, and in conformity with said opinion of said circuit judge, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, as follows, to wit: That said decree of said district court be affirmed, and that the mortgage note and deed therein described, being a note signed by the said George T. Newhall, for fifty thousand dollars, payable on demand to the order of James M. Townsend, trustee, with seven per cent. interest, payable semi-annually in advance, together with all taxes assessed upon said sum against said James M. Townsend, or the holder of said note, and dated April 12th, 1873, and a mortgage-deed, conditioned to secure said note, of even date herewith, and executed by said George T. Newhall to James M. Townsend, trustee, in fee, and covering

all the real estate then owned by said George T. Newhall in said town of New Haven, except his homestead property, are, and each of them is, as against the appellees, fraudulent in law and void; and that said appellant, James M. Townsend, do, within thirty days from the
45 date of the enrollment of this decree, deliver up to the appellees, as such assignees in bankruptcy, said note to be cancelled; and also execute and deliver to them, as such assignees, a proper release deed of all interest in any real estate which he derived by virtue of said deed from said George T. Newhall, without prejudice, nevertheless, to the right of said James M. Townsend to prove as a general creditor the several claims in his favor against the estate of said bankrupt which are specified in the aforesaid finding of facts mentioned in said decree of said district court.

And it is further ordered and decreed that the said appellees do recover of said appellant their costs, charges, and disbursements, both in said suit in said district court, being fifty-nine dollars and ten cents, and in this court, being twenty-five dollars additional thereto.

N. SHIPMAN,
District Judge, acting as one of the Judges of the Circuit Court.

46 Circuit court of the United States for the district of Connecticut.

I, Loren P. Waldo, clerk of said court, do certify that the above is a true copy of the original record in said court in the case of James M. Townsend, appellant, against Alfred Todd & Philando Armstrong, appellees.

In testimony whereof I have set hereto my hand & the seal of said court, at Hartford, in said district, this 6th day of October, A. D. 1875.

[SEAL.] LOREN P. WALDO, *Clerk.*

(Indorsement on cover:) Connecticut C. C. U. S. No. 664. James M. Townsend, appellant, vs. Alfred Todd & Philando Armstrong, assignees of Geo. T. Newhall, a bankrupt. Filed 11th October, 1875.

REC. 664—3

Supreme Court of the United States.

No. 664

JAMES M. TOWNSEND, *Appellant*,
vs.
ALFRED TODD AND P. ARMSTRONG, Assignees in Bankruptcy of GEORGE T. NEWHALL, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF

JOHN S. BEACH, *Counsel for Appellant.*

NEW HAVEN:
TUTTLE, MOREHOUSE & TAYLOR, PRINTERS.
1875.

Supreme Court of the United States.

JAMES M. TOWNSEND, *Appellant*,
vs.
ALFRED TODD AND P. ARMSTRONG, Assignees in Bankruptcy of GEORGE T. NEWHALL, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF

JOHN S. BEACH, *Counsel for Appellant.*

SUMMARY OF FACTS AS FOUND BY THE COURT BELOW.

On the 12th day of April, 1873, George T. Newhall, of New Haven, Connecticut, made a deed of certain real estate situated in said Town to James M. Townsend, of East Haven, Connecticut, the appellant.

The deed was executed, acknowledged, delivered and recorded, in all respects in conformity with the statute laws, of the State of Connecticut, regulating the conveyance of real estate.

It is found and agreed that this deed was not made,

"With a view to defeat the object of the Bankrupt "law, or unlawfully to prevent the property from com-

"ing to the assignee of said Newhall, or to prevent the "same from being distributed under said act, or to "evade its provisions, or to violate any of the provis- "ions of the 35th section of said act."

(Record, page 12 top, 25 side.)

There was a condition or defeasance annexed to said deed, by the terms of which it was to become void upon the payment by said Newhall of a promissory note, executed by him, dated April 13, 1873, for the sum of fifty thousand dollars, payable on demand to the order of said Townsend, as trustee, with seven per cent interest.

Such a note was in fact executed by Newhall and, by agreement, placed for safe keeping in the hands of the conveyancer who drew the deed.

The defeasance annexed to the deed (and here is the supposed fatal infirmity of the conveyance) did not correctly describe the real contract between the parties.

The real contract attempted to be made the subject matter of the mortgage security was this:

Newhall was unable to meet his debts as they matured, but hoped and expected to pull through without going into bankruptcy. To this end, he had on this same 12th day of April, 1873, borrowed of Mr. Ketchum forty-five thousand dollars, for which he gave mortgage security, and having applied this sum to diminish his indebtedness, he still owed about twenty-seven thousand dollars. Of this amount, $10,000 was secured by two previous mortgages, one held by said Townsend for $2,500 and one by the bank, of which Townsend was president, for $7,500.

Townsend was desirous of assisting Newhall "and enabling him to avoid bankruptcy."

To this end, it was agreed, although there was no obligation on Townsend to raise or advance any definite sum of money, that Townsend should from time to time raise and advance money or its equivalent for Newhall's benefit, and the parties intended and supposed that he would be protected in making such advances by said mortgage security. It was further understood that if no such advances were made by Townsend, the sum of $40,000 was to be endorsed upon the note, leaving it as security for the sum of $10,000 so, as aforesaid, due ($2,500) to said Townsend, and ($7,500) to said Bank. If the advances made by Townsend were less than $40,000, the deficiency was to be endorsed as a payment on the note.

(Record, page 11 top, 23 side.)

Under this agreement and upon the faith of this mortgage security, Townsend, between the said 12th day of April, 1873, and the 1st day of August, 1873, advanced and paid the sum of $6,663.02.

(Record, page 12 top, 25 side.)

On the 4th day of October, 1873, Newhall was adjudicated a bankrupt upon his own petition, filed September 29, 1873.

(Record, page 10 top, 22 side.)

His assignees bring the bill of complaint which is the subject matter of this appeal, and pray the Court to set aside said mortgage, and to decree that Townsend release to them said mortgage title, and deliver up said note to be cancelled.

The only allegation in the bill assailing the validity of the transaction is

"That said George T. Newhall was not indebted to "any person or corporation for which the said defend-

"ant was Trustee, in any manner whatever, for any sum "which could have been secured by said note."

(Record, page 5 top, 14 side.)

Under this allegation and upon these facts, the conclusions of law deduced by the Court below, were:

"That the mortgage deed of $50,000 is void as against the creditors of Newhall, because"

First, "It is in violation of the spirit and policy of "the statutes and recording system of Connecticut."

(Record, page 12 top, 25 side.)

Second, "It is a constructive fraud upon creditors."

(Record, page 12 top, 25 side.)

Third, It "must be declared void as well by the "Federal as the State Courts."

(Record, page 14 top, 29 side.)

Fourth, "The mortgage being void as against credi- "tors at the time when the petition in bankruptcy was "filed on account of constructive fraud, is void against "the assignee in bankruptcy."

(Record, page 14 top, 30 side.)

The appellant respectfully submits that the Court erred in each of these conclusions.

First Point.

That under "the spirit and policy of the statutes and recording system of Connecticut" as now construed and administered by the the judiciary of that State, this deed is not void as being in violation thereof.

First, By a careful analysis of the Connecticut cases involving the question of the validity of mortgages executed and recorded in that State, it appears that they consist of three classes:

1st. Those in which it was claimed that the record did not disclose with sufficient certainty the *amount* of the encumbrance, as in

Pettibone vs. Griswold, 4 Conn., 158.
Stoughton vs. Pasco, 5 " 442.
Shepard vs. Shepard, 6 " 40.
Booth vs. Barnum, 9 " 288.
Hart vs. Chalker, 14 " 77.
Merrills vs. Swift, 18 " 257.

2d. Those in which the record disclosed with sufficient certainty the amount and character of the debt or liability which was intended to be secured, but the objection to their validity was that the debts or liability disclosed were not the legitimate subjects of a mortgage security, as in

Crane vs. Deming, 7 Conn., 395.
Hubbard vs. Savage, 8 " 215.

3d. Those in which the record contained a sufficiently certain description of the *amount* of the debt or liability purporting to be secured, and in which the nature of the debt or liability intended to be secured was such that it could have been secured if the record had disclosed it; but the objections were that its true character was not disclosed, that the record set up a fictitious debt or liability, instead of the real debt or liability, as in

Sanford vs. Wheeler, 13 Conn., 165.
North vs. Belden, 13 " 376.
Mix vs. Cowles, 20 " 420.
Potter vs. Holden, 31 " 385.

This mortgage falls within the third class.

It cannot be denied that rules of great stringency are advanced in some of these earlier cases, and that in later cases down to and including Merrills vs. Swift, 18 Conn., 257, these rules are occasionally to be found interpolated as dicta.

But the Courts in the application of these rules soon relaxed their rigidity.

In Hubbard vs. Savage, 8 Conn., 219, Judge Daggett in giving the opinion of the Court, says:

"I am unable to see in the absence of all intention to "deceive, how a deed given by a man indebted at the "time, to secure against future liabilities can be deemed "void. * * It is said that the recording act would "be defeated by giving effect to this deed. It is true "that the decisions in Pettibone vs. Griswold, 4 Conn., "158, in Stoughton vs. Pasco, 5 Conn., 442, and in "Sheppard vs. Sheppard, 6 Conn., 38, established the "doctrine that mortgages may be taken for '*existing* "debts, *existing* liabilities and *perhaps* for debts to be "contracted in the future.' * * I am aware that "there is a '*perhaps*' which precedes the class of liabili- "ties 'for debts to be contracted in the future,' in the "opinion of the Chief Justice in Pettibone vs. Griswold "and Stoughton vs. Pasco, but I think it may now be "erased."

In this case of Hubbard vs. Savage the future liability intended to be protected, was correctly described in the condition.

In the next Connecticut case bearing upon this question (Sanford vs. Wheeler, 13 Conn., 165), a different state of facts existed.

Stephen Wheeler, the mortgagor, owed his son George Wheeler $1,500, and other creditors about

$1,200, for which George had become surety, but no part of which he had paid.

The mortgage note described was for the whole $2,700 payable absolutely on demand. Stephen Wheeler, the mortgagor, then made a deed of assignment to trustees for his creditors, who sought to set aside the deed as void.

The Court held that

"For so much of the consideration of the note described in the condition of this mortgage deed, as consists of the actual debt due from Stephen Wheeler to George Wheeler, this mortgage must be supported."

"And however equitable as between the parties to the mortgage it may be that it should stand as security, not only for the debt really due, but as an indemnity also for the liabilities of the mortgagee, yet as against third persons interested, it can no more be made to do this, *than a mortgage given to secure a bond debt of a specified description, can be made to remain as security for the payment of a book debt.*"

The above paragraph is italicised that it may be the more readily referred to hereafter.

The next Connecticut case in chronological order is North vs. Belden, 13 Conn., 383.

The decision, it must be conceded, is directly to the point, that a deed purporting to secure an absolute note of $500, but in fact given to secure the mortgagee for future indorsements, is invalid as against a subsequent mortgagee.

In Hart vs. Chalker, 14 Conn., 77, the mortgage security was postponed in favor of a subsequent mortgagee, for the reason that the condition simply de-

scribed the date of the note but omitted to give its amount.

In Merrills vs. Swift, 18 Conn., 257, the mortgagor being indebted to the mortgagee by book account and by sundry promissory notes, "the exact date and amount not recollected," gave him a mortgage to secure "an indebtedness of $1,500 or thereabouts." The indebtedness in fact exceeded $1,500 and the mortgage was sustained.

In Bacon vs. Brown, 19 Conn., 30, the condition of the deed was that the mortgagor should pay the mortgagee a given sum by a fixed time, and the mortgage was sustained, although the character of the debt, whether by bond, note, or book was not described.

These last three cases of Hart vs. Chalker, Merrills vs. Swift, and Bacon vs. Brown, are not cited because they are relevant to this case, but because they are the only ones (except Pettibone vs. Griswold, 4 Conn., 165, and Sanford vs. Wheeler, 13 Conn., 185), from which quotations are made by the Court below.

We may therefore concede that under the judicial system of Connecticut as established prior to, and as announced in North vs. Belden in the year 1839, this mortgage if then executed and made the subject of judicial enquiry, would have been held invalid as against subsequent purchasers and mortgagees, and against creditors enforcing liens upon the property.

We come now to the case of Mix vs. Cowles, 20 Conn , 420, decided in 1850, in which the judicial departure from the rigor of the former rules upon this subject began.

One Brown gave Mix a mortgage to secure a note of $200, payable four months from date; no indebtedness of any kind in fact existed, but the note and mortgage "were executed by Brown as a *basis of credit* to that extent." The mortgage was held valid, against the dissenting protest of Ellsworth, J., that "it cannot be reconciled with numerous adjudications of this Court."

He says, "In no case, from Griswold vs. Pettibone "down to Merrills vs. Swift. has any less rigid rule been "allowed than that already stated, viz: that the condi- "tion of the deed shall show the nature and amount of "the obligation or indebtedness. Do those appear "here? Not at all. Does it appear that the note is a "mere *basis of credit?* Quite otherwise; who will say "this record gives correct information? It declares "there is a debt of just $200, due in ninety days from "date, when perhaps there is not a dollar due."

The next and the latest case on this subject to be found in the Connecticut Reports is that of Potter vs. Holden, 31 Conn., 385, decided in 1863, directly overruling North vs. Belden.

The mortgage purported to secure four promissory notes each for the sum of $5,000, payable six months from date.

The real transaction was that the mortgage was given to secure the mortgagee against liability for endorsements then made, and which he might thereafter make for the accommodation of the mortgagor to the amount of $20,000.

Before the mortgagor had paid anything by reason of his endorsements he assigned the notes and mortgage to Potter, in trust for creditors, who held paper of the mortgagor endorsed by the mortgagee.

Both the mortgagor and the mortgagee became insolvent, and Potter, the trustee, sought to foreclose them, and "*other respondents who had acquired an inter-*
"*est in the mortgaged property, by a subsequent convey-*
"*ance of the same, but the conveyance under which they*
"*claimed was made in express terms subject to the mort-*
"*gage.*"

The Court below dismissed the petition; but the Supreme Court reversed the decree, and remanded the case to the Superior Court with directions to pass a decree sustaining the validity of the mortgage.

They say

"The ground we have taken is sustained by good
"authority. In Shirras vs. Craig, 7 Cranch, 34, the con-
"dition described a bond of $30,000 to all the mort-
"gagees, whereas the mortgage was intended to secure
"various individual liabilities. The Court held the mort-
"gage good between the parties for that purpose, and
"it is not intimated that the bond was not secured
"by it. In Mix vs. Cowles, 20 Conn., 603, the mort-
"gagor gave a note for $200, the consideration of which
"was goods sold and to be sold by the mortgagee to the
"mortgagor. The mortgage was held to be good even
"against creditors to the extent at least of the goods
"sold when the mortgage was given. These cases cover
"the whole ground claimed by the present petitioner."

From this analysis it appears that the history and present posture of the judicial system of the State of Connecticut governing the validity of mortgages, given as security for future advances or liabilities, may be thus stated.

It began (as in Pettibone vs. Griswold) by doubting the validity of such securities; that doubt was solved in

favor of their validity in Hubbard vs. Savage, 8 Conn., 215, but in that case and in Sanford vs. Wheeler, 13 Conn., 165, and North vs. Belden, 13 Conn., 376, it was held essential to the validity of the security as against subsequent purchasers and mortgagees, that the true nature of the contemplated advances or liabilities should be accurately described in the condition, until in Mix vs. Cowles, 20 Conn., 420, and Potter vs. Holden, 31 Conn., 385, this element was so far eliminated, as to make the mortgage valid against subsequent mortgagees and purchasers even though the real debt or liability be not described in the condition.

It is a significant fact that the original doubt was solved, and this element eliminated, under the same high judicial authority. Both the cases of Hubbard vs. Savage, 8 Conn., 215, and Potter vs. Holden, 31 Conn., 385, quote and rely on the opinion of Chief Justice Marshall, in Shirras and others vs. Craig and Mitchell, 7 Cranch, 50, giving the unanimous opinion of the Court:

"It is true that the real transaction does not appear "on the face of the mortgage. The deed purports to "secure a debt of £30,000 sterling due to all the mort-"gagees. It was really intended to secure different "sums due at the time from particular mortgagees, ad-"vances afterwards to be made, and liabilities to be in-"curred to an uncertain amount.

"It is not denied that a deed which misrepresents the "transaction it recites, and the consideration on which "it is executed, is liable to suspicion. It must sustain a "rigorous examination. It is certainly always advisable "fairly and plainly to state the truth. But if upon in-"vestigation the real transaction shall appear to be fair, "it would seem to be unjust and unprecedented to de-

"prive the person claiming under the deed of his real "equitable rights, unless it be in favor of a person who "has been in fact injured and deceived by the misrepre- "sentations. That cannot have happened in the pres- "ent case."

We therefore insist that if the validity of this mortgage was in question to-day before the judiciary of the State of Connecticut, it would be held a valid security to the extent of all bona fide advances made by the mortgagee upon the faith of it, as against the claim that it "is void as being in violation of the spirit and policy of the statutes and recording system of Connecticut."

That it would be held valid as against all claimants, taking their conveyance subject to such a deed, must under the authority of Potter vs. Holden, 31 Conn., 385, be conceded.

Second Point.

This deed is not void as being "a constructive fraud upon creditors" "under the spirit and policy of the statutes and recording system of Connecticut."

First. In the absence of actual fraud there is no authority in Connecticut (and none elsewhere) justifying the claim that the mere misdescription of the character of a debt or liability in the condition of a mortgage deed, is a legal fraud upon creditors.

Such a misdescription may in certain cases create equitable rights in favor of persons who have been thereby injured or misled, and in view of the earlier cases it may be conceded that it was formerly the law of Connecticut that equitable rights might accrue under

such misdescription in favor of those who had not been in fact injured or misled thereby.

But it is not now and never was the law of Connecticut that such misdescription involved constructive fraud, thereby avoiding the deed.

The only two cases in which the mortgage has been held invalid by reason of the failure correctly to describe the character of the debt or liability attempted to be secured, are North vs. Belden, 13 Conn., 376, and Sanford vs. Wheeler, 13 Conn., 165. In the former, the condition described a note of $500 as evidencing an absolute indebtedness, the fact being that it was given to secure against liability upon future endorsements. It was held inoperative as against Peck a subsequent mortgagee. But there is no suggestion of constructive fraud to be found in the opinion of the Court, and its judgment was not that the deed be set aside as void, but that the judgment of the Court below "that this mortgage must be *postponed* to that of Peck" be affirmed.

It may said that in this case, the rights of creditors were not involved, that a deed may be constructively fraudulent as to them, and still operative and valid against the grantor.

But if we turn to the other case of Sanford vs. Wheeler, 13 Conn., 165, we find that the precise question was litigated between a trustee for creditors and the claimant under a mortgage.

The mortgage described an absolute indebtedness (omitting fractions) of $2,700. It was found that $1,500 was such in fact, but that the remaining $1,200 represented a contingent liability as surety for the mortgagor.

The counsel for the trustee insisted:

"*Secondly*, This mortgage is void as being opposed "to the policy of our recording system, which requires "that the condition give reasonable notice to the credi- "tors of the incumbrance."

Did the Court sustain this claim and find in the misdescription such legal fraud as to avoid the deed?

Not at all. They held it valid to the extent of $1,500, and invalid as to the residue.

But this was not upon the theory that the misdescription involved constructive fraud. If the conveyance was fraudulent as against creditors, it was wholly void.

There is no rule of law better settled than that a mortgage security fraudulent and void as to part of the indebtedness attempted to be secured, cannot stand good for such part as would be "bona fide," if isolated from contact with fraud.

Wooden vs. Hawes, et al., 10 Conn., 50.

There is and can be no distinction in this respect between actual and constructive fraud. Fraud in fact and fraud in law differ only in their mode of proof. The former may involve an enquiry as to the intention of the parties to the instrument, whereas constructive fraud results from an act, which the law declares to be fraudulent, without enquiry into the motives of the actor. But the fraud being established and submitted to the Court for adjudication, the judgment as to its effect upon a given transaction will be the same, irrespective of the kind of evidence by which it was proved.

Bump on Fradulent Conveyances, 71.

Although, therefore, there are some unguarded expressions used in deciding Sanford vs. Wheeler, which

seem to have led the Court below to the inference that the case is an authority for the theory that constructive fraud may be involved in the mere misdescription of the true character of a mortgage debt, the judgment in that case sustaining the validity of the mortgage, for the larger fraction of the misdescribed debt, demonstrates that it must have been based on another and a different theory.

A careful examination will show that in every case, the theory upon which these Connecticut invalid mortgages have been set aside—whether the invalidity originated in the uncertainty as to the amount of the secured debt, or in a misdescription of its character, has been, not that the deeds were fraudulent in law, but the infirmity pointed out and relied upon was a defective compliance with one of the statute requisites for a valid deed.

The statute prescribes that "all conveyances of "lands shall be in writing, sealed by the grantor and "subscribed by his own hand" * * "attested by two "witnesses with their own hands" and "acknowledged "by the grantor to be his free act and deed," "and no "conveyance shall be effectual to hold lands against "any person but the grantor and his heirs, unless re-"corded on the records of the town in which the lands "lie."

The obvious intent of this last enactment was that the title to land should in all cases appear of record, and the earlier cases held that this intent was so far defeated by the record of a mortgage conveyance, the defeasance of which was uncertain as to the amount, or incorrect as to the character of the debt, that it could not be held effectual against any other person than the grantor and his heirs. But these cases all recognize a clear distinc-

tion between a deed defective by reason of a failure to comply with one of these requisites, and a deed void by reason of fraud, actual or constructive. Not only so, but it has repeatedly been held in Connecticut that an unrecorded deed is good against every one (creditors included) having actual notice of its execution.

Hinman vs. Hinman, 4 Conn., 580.
Hamilton vs. North, 34 " 501.

And in Tingley vs. Cutler, 7 Conn., 295, Peters, J., says: "An unrecorded deed from the plaintiff's grantor "is good between the parties, and would be sufficient "for the plaintiff in an action of ejectment against a "wrong doer; as a *valid deed* accompanied by posses- "sion is *prima facie* evidence of title."

But perhaps no better illustration of the true theory upon which these mortgages were in the earlier cases held not effectual can be found, and no clearer demonstration that such theory excludes all idea of constructive fraud can be made, than by referring to the italicised paragraph on page 7, from the opinion of Judge Church in Sanford vs. Wheeler, 13 Conn., 168.

"However equitable as between the parties to the "mortgage it may be that it should stand as security, "not only for the debt really due, but as an indemnity "also for the liabilities of the mortgagee, it can no more "be made to do this, than a mortgage given to secure a "bond debt, can be made to remain as security for the "payment of a book debt."

Would such a misdescription, given us by this learned Judge as a crucial test of infirmity, involve constructive fraud? Wherein? The debt exists, the money has

been advanced to the exact amount called for in the condition, but the evidence of that indebtedness is described as having a seal annexed to the signature, whereas the evidence of the debt when produced is unsealed.

It seems too clear for argument that whatever may be the theory upon which such a deed should be postponed, or held invalid, it would not be upon the theory of fraud, either in fact or in law.

In Rood vs. Welch, 28 Conn., 157, which was a controversy between an assignee in insolvency and a claimant under a mortgage of personal property, the deed was claimed to be, and the Court found that it was, under this double infirmity.

1st. That the conveyance was invalid because of the uncertainty of its description of the mortgage debt.

2d. That it was fraudulent and void, because the grantor retained the possession of the personal property mortgaged.

Here surely we must get some light as to how this question is regarded by the Courts of Connecticut.

If it be so, that a deed inoperative because of the uncertainty of its description of the mortgage debt "is "void as being a constructive fraud upon creditors "under the spirit and policy of the statutes and recording "system of Connecticut," there will be no necessity for the Court to make any distinction between *this* infirmity and that which makes the deed void as a constructive fraud upon creditors under the policy of the law which forbids the vendor of personal property to retain its possession.

But the Court carefully distinguish between the resulting consequences of these two infirmities.

As to the first they say,

"A mortgage of real estate describing the debt or duty "intended to be secured, as it is described in the mort- "gage before us, would be *inoperative* as against attach- "ing creditors and subsequent purchasers" (citing Pettibone vs. Griswold, 4 Conn., 162, and the other cases on this point, and they hold the same rule applies to mortgages of personal property).

As to the second they say,

"By the well settled law of Connecticut a mortgage as "well as an absolute sale of personal property capable "of immediate delivery, is as against creditors and sub- "sequent purchasers *fraudulent and void*, unless the "possession of the property accompanies and follows the "transfer."

And they conclude,

"It is unnecessary for us now to decide whether as a "general proposition it is strictly true that 'the condi- "tion of trustees under a deed of assignment' is 'that "of creditors and bona fide purchasers' or not, because "in the case before us *the possession of the property be- "ing retained by the mortgagor*, the mortgage is to be "regarded as *prima facie* fraudulent and void, so that "the mortgagee has no title whatever to interpose "against the trustee's claim."

Here, then, were two infirmities in the same deed, one which would make it necessary because it did *not* involve

fraud either in fact or in law, to enquire into the relative rights of the assignee in bankruptcy and the mortgagee, but the other making that enquiry unnecessary because it *did* involve fraud in law.

And the Court waive the enquiry as to those relative rights under the deed as a defective instrument, because and only because it was for another and a different reason constructively fraudulent and void.

Third Point.

If this deed is not void as to creditors as being a constructive fraud upon them under the spirit and policy of the statutes and recording system of Connecticut, then it remains a valid security to the mortgagee for the amount of his advances made upon the faith of it, as against the assignee in bankruptcy of the mortgagor, even though under that system it would be held by the State tribunals invalid as to subsequent purchasers and mortgagers, and as to attaching creditors of the mortgagor.

First. There is a vital difference between the rights of a claimant against an assignee in insolvency under a deed "void" by statute enactment, or otherwise, and one which a statute enacts shall not in the absence of certain requisites be "effectual."

This distinction is well put by Judge Ellsworth in Palmer vs. Thayer, 28 Conn., 245.

"If the bankrupt had fraudulently conveyed away "his property before he failed and assigned, that con- "veyance of course created no equity in favor of the "fraudulent grantee, and is by statute made positively

"and absolutely void as to creditors, so that the property "yet remains the proper estate of the bankrupt, and the "assignee acting in their behalf must inventory it and "treat it as a portion of the assets. * * But suppose "I purchase a farm of my neighbor and pay him for "it $500. Through mistake one of the witnesses "to the deed was really incompetent as a witness, "and my deed is therefore as a conveyance of the "legal title inoperative. The vendor fails and assigns "all his estate. The assignee takes the legal title of the "farm, but does he take the equitable? Have not I a "lien on the farm; a claim altogether higher than that "of the assignee?"

He answers the question in the affirmative and adds:

"The same is held by Chancellor Walworth in the "matter of House, 1 Paige, 128. He there says:

"It is a well settled rule of equity that the general "assignee of a bankrupt takes his estate subject to every "equitable claim which exists against it by third persons, "and that the assignee cannot avail himself of the legal "estate thus acquired to defeat a prior equity of which "he had no notice at the time of the assignment."

The case has thus far been considered in the light of Connecticut jurisprudence. It is confidently submitted that if this petition was in this centennial year pending in the Courts of that State brought by an insolvent assignee, it would be dismissed.

Fourth Point.

The assignees in bankruptcy deriving their rights and powers under the general bankrupt act of the United States, are not, upon the facts found, entitled to the decree granted by the Court below.

First. There is no occasion to dispute the proposition that "when rules of property in a State are fully "settled by a series of adjudications, the Federal Courts "adopt the decisions of the State Courts" because,

I. There is no such infirmity in this conveyance as under the most recent Connecticut adjudications, defeats its equities against those who take their title subject to those equities.

Potter vs. Holden, 31 Conn., 385.

II. There are no adjudications by the State tribunals assuming to expound the relative rights of a claimant under such a conveyance, and of an assignee deriving his powers under an act of Congress.

Second. There is no occasion to dispute the proposition that the assignee as the representative of creditors is clothed with all their rights to set aside conveyances void as to them.

I. This conveyance is not void as to creditors.

1st. The agreed facts exclude it from the annulling provisions of the bankrupt act.

2d. There is no local statute enacting it void.

3d. It would not be void under the rigid rules of the earlier State decisions interpreting the statute requirements for the recording of deeds.

4th. It would not be held even invalid, under the recent relaxation of those rules.

II. If this conveyance is void as to creditors, yet under well settled principles of law recognized by the judicial tribunals, both of the Federal and the State Courts, it is not void as to creditors at large—creditors in the abstract—but only as to those individual creditors who pursue the remedies prescribed by law to set it aside.

"A creditor at large, as it is termed, cannot impeach "the conveyance, but only a creditor having some pro- "cess on which the property may be lawfully seized, and "by which it is made liable, either immediately or ulti- "mately to be appropriated in satisfaction of his debt. "Such process by our law is an attachment or execu- "tion, to one of which it is necessary for the creditor to "resort, and to either of which he may resort in order "to avail himself of the property thus fraudulently trans- "ferred. Without such process he has no right to med- "dle with the property; and if he should do so, he "would be liable to all the consequences of an unlawful "interference with it, equally with any other person who "was not a creditor. * * These principles, which "have never to our knowledge been questioned, settle "the point now before us."

Per STORRS, J.

Owen vs. Dixon, 17 Conn., 498.

"The plaintiff cannot be permitted to impeach his "own conveyance to Ives. It is good against him cer- "tainly, and equally good against his creditors until by "legal proceedings they have acquired a title to the "property."

Per ELLSWORTH, J.

Birdsey vs. City Fire Insurance Co., 26 Conn., 171.

III. The derivative rights of an assignee in bankruptcy as the representative of creditors must be measured by the same rules that limit the rights of those from whom they are derived.

"I think the position is a sound one that the assignee "represents the creditors, and that he is authorized "and is bound to protect their interests. In the in- "stance of a fraudulent conveyance, where by his par- "ticipation in the fraud, the debtor has lost the right to "attack the conveyance, I do not doubt the power of "the assignee as representing creditors to attack it "whenever creditors could do so. The difficulty here "is that the creditor has no such right. Has the "assignee any greater rights than the creditor?

"* * The New York reports are full of cases to "the effect that a simple debt or a judgment even will "not justify a bill to set aside as fraudulent, a convey- "ance of real estate The creditor must first have a "deed or a mortgage from the debtor, a sheriff's cer- "tificate of sale on execution, or some equivalent right "giving a claim upon the specific property conveyed.

* * * * * *

"The cases are based upon the theory, that the party "attacking the fraudulent act must have an interest in,

"or lien upon, the specific property thus encumbered. "This is an indispensable requisite.

"The assginee gains no additional rights over those "possessed by the bankrupt, by a conveyance from him, "or by his authority. The bankrupt can transfer no "lien upon the specific property because he possessed "none. The creditors can give to the assignee no such "lien for the same reason. (Gibson vs. Warden, 14 "Wall, 248.)"

Per HUNT, J.

In the matter of Charles Collins a bankrupt.
12 Blatchford, 550.

IV. It is not pretended that at the time when this bankrupt made his assignment, any creditor had acquired or claimed a lien on this property, by judgment, levy of execution, attachment on mesne process, or otherwise, nor did any such lien in fact exist.

SUMMARY AND CONCLUSION.

The mortgage is a valid security to the mortgagee for $6,663.02 advanced and paid by him.

The facts being as found by the Court below that the "the said Townsend did not have reasonable cause to "believe that the said $50,000 mortgage was made "with a view to defeat the object of the Bankrupt law, "or unlawfully to prevent the property from coming to "the assignee of said Newhall, or to prevent the same "from being distributed under said act, or to evade its "provisions, or to violate any of the provisions of the "35th section of said act."

(Record, page 12 top, 25 side.)

It is a valid deed unless the assignees as representing creditors can defeat it as being "in fraud of creditors."

This cannot be done because,

1st. The deed is not fraudulent and void as to creditors, either under the rules of the common law, or by statute enactment, or as being contrary to the policy of the recording system of Connecticut.

2d. If it was fraudulent as to creditors, it is void as to those creditors only who at the time of the adjudication in bankruptcy had a specific lien upon the property described in the deed. These assignees are not the representatives of such creditors, for there were, and are, no such creditors to be represented.

JOHN S. BEACH,

Solicitor for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 664. October Term, 1875.

JAMES M. TOWNSEND, *Appellant,*

vs.

ALFRED TODD AND PHILANDO ARMSTRONG, ASSIGNEES IN BANKRUPTCY OF GEORGE T. NEWHALL, BANKRUPT, *Appellees.*

IN EQUITY.

Appeal from the Circuit Court of the United States

FOR THE

DISTRICT OF CONNECTICUT.

BRIEF FOR APPELLEES.

FILED UNDER THE TWENTIETH RULE.

SIMEON E. BALDWIN,

Of counsel.

HOGGSON & ROBINSON, Printers, New Haven.

In the Supreme Court of the United States.

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James M. Townsend, *Appellant*,

vs.

Alfred Todd and Philando Armstrong, Assignees in Bankruptcy, *Appellees.*

Equity Appeal from the Circuit Court of the United States, for the District of Connecticut.

Brief filed under the 20th Rule in behalf of the Appellees.

APPELLEES' STATEMENT OF THE CASE.

This case arises upon a bill in equity, filed originally in the District Court of the United States for the District of Connecticut, by the assignees in bankruptcy of George T. Newhall, who had been previously adjudicated a bankrupt by that Court, to set aside a note and mortgage for $50,000, executed by the bankrupt in favor of the defendant.

The District Judge made a special finding of the facts in the case, which was satisfactory to both parties, and has been adopted by mutual consent "as an agreed statement of facts, on which to "predicate the final decree in said cause;" (See stipulation of counsel, Record, page 18.)

The material facts as thus ascertained and agreed on, are as follows:

George T. Newhall, of New Haven, Connecticut, was, on April 12th, 1873, in financial embarrassment, and "insolvent within "the meaning of the Bankrupt Act;" (Record, page 10), all of

which was known to the defendant; (Record, page 12). On that day Newhall obtained a loan of $45,000 upon a mortgage of real estate in New Haven. The defendant was president of the Townsend Savings Bank of New Haven, and both he and the Bank were creditors of Newhall, to the amount, in all, of over $31,000, besides a mortgage note of Newhall for $7,500 in favor of one Chapman, held by the Bank as collateral. From the avails of the $45,000 loan the Bank was paid off in full, except as respects the Chapman note, and the defendant was paid off, except as to one mortgage note of $10,000, on which a balance of $2,500 was left due. Newhall still owed to other parties an amount not definitely known, but at least $27,000, and the defendant proposed that he (Newhall) should execute a mortgage note *for* $50,000, *payable on demand to the order of James M. Townsend, trustee, with seven* per cent. *interest, pagable semi-annually in advance, together with all taxes to be assessed upon said sum*, and secure it by a mortgage of all his real estate in New Haven, except his homestead. The only proposed consideration for this transaction was, *first*, that the defendant should endeavor to borrow money or securities, or lend money, or furnish other pecuniary assistance, for the purpose of satisfying Newhall's creditors, and *second*, that the new note should be a further security for the Chapman note of $7,500, and the balance of $2,500 due the defendant on his old mortgages. (Record, page 11.) The defendant was to assume no obligation to raise or advance anything, and neither party had any definite idea of how much could or ought to be raised, or how anything should be raised; and "the only proposition definitely agreed on between said parties, in regard to the money to be advanced on said note," was that the note and mortgage should be delivered to H. D. White, the conveyancer who "drew them, for safe keeping, and that "by the aid of that mort-"gage said Townsend might thereafter raise money, or its equiva-"lent, for Newhall's benefit, or might loan him money himself, "which money, or its equivalent, so loaned, was to be secured by

"said note and mortgage." If the defendant should, in fact, render no pecuniary aid, or aid to an amount less than $40,000, it was "understood" that White was to make such endorsements of payments on the note as to leave it representing only an indebtedness for the amount of such aid, if any, as might be furnished by or through the defendant, under the new arrangement, and for the amount of the $7,500 Chapman note, and the $2,500 balance left due to the defendant on his old mortgage, unless these should also be wiped out by the contingent aid to be furnished under said arrangement.

This transaction thus left Newhall's real estate encumbered by the $7,500 Chapman mortgage, and the old mortgage to the defendant for $10,000, (Record, page 10), on which $2,500 was still due, and by the new $50,000 mortgage to the defendant as trustee, of which $10,000 was in fact but additional security to his Bank and himself for those old mortgages, while the remaining $40,000 was not due at all, and might never be.

In fact, the defendant "did not borrow money or securities "from any third person, upon the faith of this mortgage;" and no endorsements have been made on the note, though the mortgage was recorded in the land records of New Haven. (Record, page 11.)

The defendant endorsed certain notes of Newhall soon after April 12th, 1873, most of which ($1,663.02) he has been compelled to pay; and at other times lent him $5,200; all in the belief that he was secured, for so doing, by the mortgage in question. He "did not have reasonable cause to believe that the "said $50,000 mortgage was made with a view to defeat the "object of the Bankrupt Act, or unlawfully to prevent his property "from coming to his assignee in bankruptcy, or to prevent the "same from being distributed under said Act, or to evade its pro-"visions, or to violate any of the provisions of the 35th section of "the said Act."

Newhall filed his petition in bankruptcy September 29th, 1873, within six months from the date of the mortgage.

The bill charges that, "at the date and delivery of said note "and mortgage, said George T. Newhall was not indebted to any "person or corporation for which the said defendant was trustee, "in any manner whatever, for any sum, which could have been "secured by said note; and that if there was any trust created "by said note and mortgage, it was a trust for the benefit of said "George T. Newhall only," (Record, page 6); and the answer sets up the advances made under the mortgage, alleging its real character and purpose to be somewhat, though not exactly, such as has been found by the Court, and claims that it is a valid security to the amount of such advances. All the material allegations of the bill, therefore, are either admitted by the answer, or found true by the Court, and both the District and Circuit Courts decreed for the complainants.

The question before this Court is simply whether the allegations in the answer, so far as they are supported by the finding of the District Court, make this $50,000 mortgage to James M. Townsend, trustee, a valid security in favor of James M. Townsend, individually, as against the assignees in bankruptcy of the mortgagor, for the defendant's endorsements and loans made in reliance upon it.

That he can come in for these endorsements and advances as a general creditor is not disputed, and the right to do so is saved by the decree of the Court below.

BRIEF FOR THE APPELLEES.

I.

Was the mortgage valid, as against Newhall's creditors, before the proceedings in bankruptcy?

1. This question must be decided according to the law of Connecticut, as it is one affecting land titles, and turns upon the recording system of that State.

Jackson ex dem. *St. John* vs. *Chew*, 12 Wheat., 153.

2. By the laws of Connecticut, as expounded by her highest Court, the mortgage in question was void as against attaching creditors, or subsequent *bona fide* purchasers.

The decisions of the Supreme Court of Errors of Connecticut, on the subject of the certainty and the conformity to the facts required in drafting the conditions of mortgage deeds, fully support the decree appealed from, and are carefully reviewed in the opinion of the District Judge, to which this Court is respectfully referred. (Record, pages 12 to 14.)

Since Judge SHIPMAN wrote this opinion, another case has been decided by the Supreme Court of Errors of Connecticut, which re-affirms the rule in question in the most positive terms,—that of *Bramhall* vs. *Flood*, 41 Conn., Part 1, page 68. In 1868 one Reed mortgaged land to Ferris by deed conditioned to secure his note for $1000, of even date therewith, payable to Ferris or order in one year. At that time, Reed owed Ferris upon certain notes, and also $471 for goods sold, and Ferris had agreed to sell him other goods to the amount, with those already sold, of $1000, for which amount Reed was to have a year's credit, and the mortgage was given to secure its payment. It was not intended

to give a note for $1000, and no note was ever in fact given, but Ferris believed the mortgage to be a valid security for the sum mentioned, and sold Reed goods to the amount of $323, on the faith of it and in pursuance of his agreement as to selling on credit. He afterwards brought a bill in equity to foreclose the mortgage, pending which one Bramhall, a creditor of Reed, attached Reed's interest in the mortgaged premises; and it was held that the attachment prevailed over a foreclosure subsequently obtained, on account of the falsity of the statements in the condition of the mortgage. As only the first Part of Vol. 41 of the Connecticut Reports is yet published, and it is not generally accessible, we quote at length from the unanimous opinion of the Court, delivered by Chief Justice PARK, (p. 70–72.)

"It was held, as long ago as the case of *Pettibone* vs. *Gris-*
"*wold*, 4 Conn. R., 158, that under our recording system the
"condition of a mortgage deed must give reasonable notice of
"the incumbrance on the land mortgaged, in order to affect the
"creditors of the mortgagor, who have no notice of the real incum-
"brance. The Court say, page 162: 'A creditor is not obliged
"by law to make inquiry *in pais* concerning the liens on the
"property of his debtor; but on application to the record he may
"acquire all the information which his interest demands. At
"least he must have the power of knowing from this source the
"subject matter of the mortgage, that his investigation may be
"guided by something which will terminate in a certain result.
"And what is not of less importance, the incumbrance on the
"property must be so defined as to prevent the substitution of
"everything which a fraudulent grantor may devise to shield him-
"self from the demands of his creditors.'

"This case is the leading one in this State regarding the re-
"quisite certainty in the description of a mortgage debt. It has
"been followed by the cases of *Shepard* vs. *Shepard*, 6 Conn. R.,
"37, *Stoughton* vs. *Pasco*, 5 id., 442, *Hubbard* vs. *Savage*, 8 id.,
"215, *Booth* vs. *Barnum*, 9 id., 286, *Sanford* vs. *Wheeler*, 13
"id., 165, *North* vs. *Belden*, id., 376, *Hart* vs. *Chalker*, 14 id.

"77, and many others which it is unnecessary to mention. In "*Sanford* vs. *Wheeler*, the Court use this language: 'The in- "firmity in this mortgage is not that the true amount of the "debt is not set forth, but that a claim altogether different in "its nature, character and amount from the one referred to in "the condition of the mortgage deed is attempted to be substi- "tuted for the debt described; the claim of a surety and not of a "creditor. And however equitable as between the parties to the "mortgage it may be that it should stand as security not only "for the debt really due, but as an indemnity also for the liabili- "ties of the mortgagee, yet as against third persons interested "it can no more be made to do this, than a mortgage given to "secure a bond debt of a specified description can be made to "remain as security for the payment of a book debt.' The debt "described in the mortgage deed in that case was an uncondi- "tional note of a certain amount, which was made up in part by "a debt due from the mortgagor to the mortgagee and in part "by liabilities assumed as surety by the mortgagee to the credi- "tors of the mortgagor on their claims against him, which claims "were still outstanding against the mortgagor and mortgagee. "In *Hart* vs. *Chalker*, the defect consisted in omitting to men- "tion in the mortgage the amount of the note attempted to be "secured, which was otherwise fully described; yet the Court "held that the mortgage deed was fatally defective as against a "subsequent incumbrancer. The Court say: 'It is far better that "one honest creditor should have his security postponed to "another perhaps equally honest, who has apparently a subse- "quent title, rather than that the valuable provisions of our "statute relative to the recording of deeds should be nullified "or its vitality impaired.' The case of *North* vs. *Belden* is an "important one upon the subject of mortgage securities, and is "exceedingly strong against the claims of the present defendant.

"These cases fully show that the mortgage deed, in the case "under consideration, is fatally defective as against the plaintiff. "The indebtedness described in the mortgage is that of a note

"for the sum of one thousand dollars, when no such note existed "between the parties, nor is it pretended that such a note was "ever agreed to be given. There was an indebtedness between "the parties, growing out of a certain note at two months, and "a certain book account, amounting in the aggregate, to the "sum of $756.07; but to substitute this indebtedness for the one "described in the mortgage, would bring upon creditors all the "mischief so forcibly described in the case of *Hart* vs. *Chalker*, "and to prevent which our statute, and the decisions in the cases "cited, were made."

The case of *North* vs. *Belden*, 13 Conn., 376, referred to with approbation in this decision, was one where a mortgagee having a much stronger equity than the present defendant was postponed to a subsequent mortgagee. North had agreed to indorse for Belden, to the amount of $500. To secure him for any future loss from such indorsements, Belden gave him an absolute demand note for $500., and secured it by a mortgage of real estate. The indorsements were subsequently made, and the indorser damnified, yet his security was set aside in favor of a second mortgagee, because it was not drawn according to the principle "definitely settled, that the real nature of the transaction, so "far as it can be disclosed, must appear upon the record, with "reasonable certainty." (Opinion by Chief Justice WILLIAMS, page 380.)

It will be remarked that in *North* vs. *Belden*, the mortgagee was under an absolute obligation to indorse to a certain amount, while in the case at bar, the defendant was under no obligation to do anything, at the time his mortgage was executed.

The appellant claims that if a mortgage describes the amount of the debt or liability correctly, and such debt or liability is of a character which can be legitimately secured by a mortgage, the fact that it is stated in a fictitious form, will not prevent it from

protecting all advances made upon the faith of it, as against all persons taking the land subject to valid existing equities.

If this last phrase is confined to mere volunteers, we have no occasion to question it.

Mix vs. *Cowles*, 20 Conn., 420, was such a case, and was relied on by the appellant in the Court below. Mix sold goods to Brown to the amount of $103, and agreed to sell him enough more, as called for, to make up the amount of $200., in consideration of Brown's giving him a note and mortgage for that sum. Brown gave the mortgage, and the decision was simply that it was sufficient to entitle the mortgagee to redeem a *prior* mortgage. A grantee of the equity of redemption, who was a mere volunteer, would have had the same right. The Court say, page 426:

"The contract between the parties was an absolute one. The "plaintiffs agreed to furnished goods to the amount of two hun- "dred dollars; and Brown agreed to pay for them by his note "and mortgage. There is no discrepancy between the substance "and form of this transaction. The record speaks the entire "truth in its legal effect, without detailing the circumstances. "The distinction between this mortgage, in this feature of it, and "the mortgages set forth in the cases of *Sanford* vs. *Wheeler*, "13 Conn. R., 165, and *Belden* vs. *North*, Id. 376, is very ob- "vious. In this case, the payees of the note were under an ab- "solute obligation to deliver the goods, as called, for to the full "amount of the note. In the cases referred to, they were mere "sureties, who might, or might not be subjected to payment; "there was no *debt*, as the note and mortgage pretended, but "only a *contingent liability*."

The language used by Chief Justice CHURCH, in the last sentence quoted above, shows plainly how the Court would have regarded a mortgage like that to the defendant, where there was "no debt, as the note and mortgage pretended, but only a con-

"tingent liability," or, indeed, none at all. *Bramhall* vs. *Flood*, cited above, also shows that a different decision would have been reached, had the rights of creditors been in question.

The appellant also relied in the Court below on the case of *Potter* vs. *Holden*, 31 Conn., 385.

This was a case of a mortgage, not of real, but of personal property, conditioned to secure notes for $20,000, which had been given to the mortgagee to secure him for certain accommodation indorsements already made, to an amount exceeding $20,000. A foreclosure was sought against the mortgagor, and certain subsequent grantees, claiming under conveyances, which were made in express terms subject to the mortgage. The Court held that inasmuch as no rights of *creditors* were concerned, and the mortgagee had *already made* indorsements to the full amount of the mortgage notes, his contingent liability as indorser was, as between the parties and grantees having "no higher equitable rights," a sufficient consideration to make the notes enforceable to the extent to which he had been subsequently damnified.

That neither of these cases can be construed as changing the ancient rule, as laid down in *Pettibone* vs. *Griswold*, 4 Conn., 158, defining the certainty and truthfulness required in the conditions of mortgages, is evident from the re-iteration of that rule in *Bramhall* vs. *Flood*, 41 Conn., 70, above cited.

A contract of indemnity for future obligations can therefore be secured by mortgage of real estate in Connecticut, as against the creditors of the mortgagor, or subsequent purchasers for value, only when expressed in terms honestly stating the obligations to be assumed.

3. The laws of Connecticut have always allowed the attachment of real estate and equities of redemption on mesne process in every case.

Revised Statutes of 1875, page 396, Sec. 1.

Any creditor of Newhall, therefore, who had chosen to attach the mortgaged premises, prior to the commencement of proceedings in bankruptcy, could have held them free of the pretended mortgage.

It was not considered necessary by the appellees, under what they had supposed to be the settled construction of the Bankrupt Act, to offer proof in the Court below of the pendency, in fact, at the time of the commencement of proceedings in bankruptcy, of attachments, which were an inchoate lien on the mortgaged premises. Should proof of such fact be deemed material by this Court, they trust the cause would be remanded for further evidence on that point.

II.

The mortgage was voidable under the law of Connecticut, not only by the creditors of Newhall, but by a trustee in insolvency under the State Insolvent Law.

The law vests in the trustee "all the property of the debtor."

Revised Stat. of 1875, pp. 378, 379; Sec. 1, 5.

The rights of a trustee in insolvency, under the assignment, are defined by a long series of decisions. A recent case was this: A manufacturing corporation which had mortgaged its mill and machinery by a deed duly recorded, and to secure a valid obligation, made an assignment in insolvency, after which the mortgagees first took possession of the machinery, whereupon the trustee in insolvency sued them in trover, on the ground that their omission to take possession of the personal property prior to the insolvency, was a legal badge of fraud, (under the rule in *Twyne's* case), which, so far forth, invalidated

the security. The Court sustained the action, and spoke thus of the title of the trustee:

"It is strenuously contended that in a case where there is no "evidence of actual fraud, and where the fraud is merely con- "structive from retention of possession by the mortgagor, an "assignee in insolvency is not an attaching creditor, and not en- "titled to the privileges of such a creditor. The argument is "that the assignee takes by conveyance from the mortgagor, and "therefore takes only the same rights which the mortgagor "himself has, and that as the mortgagor cannot set aside his "own conveyance, so his assignee in insolvency cannot. There "are cases where the equity of the assignee in insolvency has been "decided to be less than that of an attaching creditor; but such "assignee has always been held, in this State, to be the repre- "sentative of creditors in respect to treating as void all convey- "ances actually or constructively fraudulent.

"In giving the opinion of the Court, in *Rood* vs. *Welch*, Judge "SANFORD says, (28 Conn. R., 163, 4), 'The possession of the "property being retained by the mortgagor, the mortgage is to "be regarded as *prima facie* fraudulent and void, so that the "mortgagee has no title to interpose against the trustee's claim.' "So in 29 Conn. R., 254, the same judge says—'A conveyance "which is deemed fraudulent and void against an attaching "creditor himself, must be invalid also as against a trustee, who "stands in the place of, and represents creditors.'

"These authorities are so decisive that we have no occasion to re-examine the question on principle."

Gaylor vs. *Harding*, 37 Conn., 508, 518.

III.

If invalid as against creditors or a trustee in insolvency, under the laws of Connecticut, is the mortgage also invalid as against assignees in bankruptcy under the laws of the United States?

The existence of the national Bankrupt Act substantially cut off the right of a State trustee in insolvency to attack the mortgage in question; and the commencement of the proceedings in bankruptcy by Newhall, under that law, terminated all attachments and rights of attachments, under which it could be avoided by his creditors individually.

If it can now be set aside in favor of his creditors at all, it can be done only at the instance of his assignees in bankruptcy, and by the present proceeding.

The main object of the Bankrupt Act is to secure to the creditors of an insolvent debtor an equal participation in all his assets, giving to all the benefit of whatever the most diligent creditor could otherwise have secured to himself. For this reason pending attachments are dissolved and future ones prevented by the commencement of bankruptcy proceedings; but this is done not to deprive creditors of any rights, but to give them the fairest and fullest mode of attaining them. A law that should in such a way cut off defrauded creditors from vindicating their rights for themselves, without substituting another remedy, would be intolerable.

The provisions of the XIVth Section of the Bankrupt Act, vesting in the assignee all the bankrupt's property, including "all "the property conveyed by the bankrupt *in fraud of his* "*creditors*" were designed to avoid this mischief. To limit these words to cases of *actual* fraud would not be in harmony with the spirit or purposes of a law, which was not designed to destroy any rights of creditors, but to preserve and secure them all.

"The assignee is the representative of the creditors as well as

"the bankrupt. He is appointed by the creditors. The statute "is full of authority to him to sue for and recover property, "rights, and credits, where the bankrupt could not have sus- "tained the action, and to set aside, as void, transactions by "which the bankrupt himself could be bound. All this, of "course, is in the interest of the creditors of the bankrupt."

Sawyer vs. *Hoag*, 17 Wall., 619.

In accordance with this construction of the law, this Court has repeatedly given relief in favor of assignees in bankruptcy, against conveyances void as to creditors, either for want of a statutory requisite, or from a violation of some common law rule.

In the *Bank of Leavenworth* vs. *Hunt, assignee*, 11 Wall., 391, an assignee in bankruptcy brought an action at law to recover the value of goods taken by the Bank under a chattel mortgage. By a State statute the mortgage, for want of an immediate delivery of possession, was "absolutely void as against creditors and subsequent purchasers and mortgagees in good faith." The unanimous opinion of this Court as delivered by Mr. Justice FIELD is entirely based upon the assumption that what in such a case is voidable by creditors, either under the statute or at common law, is voidable by assignees in bankruptcy

"Transfers of personal property, situated as in this case, only "take effect as against creditors from the delivery of the proper- "ty to the purchaser.

"The stipulation in the chattel mortgage, providing that in "case of default in the payment of the notes or interest, it should "be lawful for the cashier of the bank to take possession of the "property and sell the same, does not aid the defendant for two "reasons, both equally conclusive. 1st; The mortgage was "never deposited in the office of the register of deeds of the "county where the property was situated or the mortgagors re- "sided, and was therefore void as against creditors under the

"statute of Kansas. 2d; The mortgagors remained in possession "of the goods notwithstanding the mortgage, and by its terms; "and the testimony tended to show that they continued to sell "the goods, with the assent of the defendants, until the transfer "in July, 1867. The Court could not assume the instrument to "be valid in the face of this testimony, for if the facts were "found by the jury which the testimony tended to establish, the "mortgage was fraudulent and void as against creditors."

No *actual* fraud was imputed in this case.

The next decision of this Court touching the point in question is that of *Gibson* vs. *Warden*, 14 Wall., 244. There a chattel mortgage was attacked by assignees in bankruptcy, under Section XXXV of the Bankrupt Act, on the ground that, though executed long previously, it had not been recorded until within six months of the commencement of the proceedings in bankruptcy, and was therefore void by reason of a statute of Ohio precisely the same as that relied on in *Bank of Leavenworth* vs. *Hunt*, just cited. As the Ohio Courts had determined that in such a case the mortgage became valid and effective from the date of the record, this Court necessarily held that it was a valid lien. No creditor under the State laws could have impeached it, when once recorded, however late, and there was no reason why the assignee in bankruptcy should be allowed greater rights, in a matter properly governed by the local law as to titles to property.

See an able review of *Gibson* vs. *Warden*, by Mr. Justice SAWYER, in *Edmondson* vs. *Hyde, assignee*, 7 Nat. Bankr. Reg., 10–13.

The next decision of this Court which need be noticed, is that of *Allen* vs. *Massey*, 17 Wall., 351. Here an assignee in bankruptcy filed a bill in Equity to set aside a sale of chattels not followed by a delivery of possession. The State statute provided

that such sales should "be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith." No *actual* fraud was charged, but this Court held that, as the State statute made the sale fraudulent in legal construction, the right to avoid it was expressly given by the provisions in Section XIV of the Bankrupt Act, as to conveyances in fraud of creditors.

Following *Allen* vs. *Massey*, comes *Tiffany* vs. *Boatman's Institution*, 18 Wall., 375. Here the defendant had received from the bankrupt, one Darby, payment of certain loans made at usurious rates of interest, and the assignee in bankruptcy filed a bill in Equity to recover the moneys so paid. This Court decided that, under the circumstances, the bankrupt himself would have been equitably entitled to recover the excess of interest paid above the legal rate, and that the assignee had the same right, but not a right to reclaim the principal and legal interest, since this honestly belonged to the defendant. The principle, however, that the rights of the assignee, (here a trustee under Section XLIII of the Act,) are in Equity superior to the bankrupt's, was distinctly re-affirmed by Mr. Justice DAVIS, in giving the opinion of the Court, (page 387.)

"The remaining question to be considered is, whether, in this "case, the rights of the trustee are greater than those of Darby. "It is certainly true, in very many cases, he can do what the "bankrupt could not, because he represents the creditors of the "insolvent. If, for instance, the bankrupt should create a trust "which was designed to conceal his property from creditors, "although Equity would not lend its aid to him to enforce the "trust, it would to his assignee for the benefit of creditors. And "many other examples might be cited in illustration of the rule, "but it would be a waste of labor to do so."

The illustration, here used by the learned Judge, comes very near to the case at bar. Newhall created a secret trust to a large

amount, in favor of "James M. Townsend, trustee," which could only have been designed to prevent his creditors from attaching his real estate, at the same time that it might be the basis of a fund out of which the more diligent of them, including the defendant as to his own $2,500 claim, and his Bank, as to its $7,500 claim, might be paid, and the rest compromised with, or defrauded. The defendant has, in fact, acknowledged the trust; but suppose he had not? Newhall might have not been permitted by a Court of Equity to show by parol that this absolute obligation for $50,000 was in truth but a cover, but his assignees in bankruptcy clearly could.

The last decision of this Court, *Robinson* vs. *Elliott, assignee*, decided at the last Term, and reported in 11 Nat. Bankr. Reg., 553, follows *Allen* vs. *Massey*, in holding a chattel mortgage, void as to creditors for constructive fraud in allowing an uncontrolled retention of possession by the mortgagor, with power to sell without account, to be equally void as against an assignee in bankruptcy, though given to secure a just obligation.

The same doctrine has been held almost uniformly in the Circuit and District Courts.

Brock vs. *Terril*, 2 Nat. Bankr. Reg., 643.

Re *Wynne*, 4 Nat. Bankr. Reg., 5, (Circ. Ct. Va., CHASE, C. J.)

Harvey, assignee, vs. *Crane*, 2 Biss., 496, (Circ. Ct., Ill., DRUMMOND, J.)

Edmondson vs. *Hyde*, assignee, 7 Nat. Bankr. Reg., 1, (Circ. Ct., Cal., SAWYER, J.)

Re *The St. Helen's Mill Co.*, 10 Nat. Bankr. Reg., 414, (District Ct., Oregon, DEADY, J.)

Kane, assignee, vs. *Rice*, Id., 469, 475, (District Ct., Mich., LONGYEAR, J.)

Smith vs. *Ely*, Id., 560, 565., (Circ. Ct., N. Y., WOODRUFF, J.)

Re *Leland*, 10 Blatchf., 503, (Circ. Ct., N. Y., WOODRUFF, J.)

Cragin vs. *Carmichael*, 11 Nat. Bankr. Reg., 511, 514; 2 Dill., 519, (Circ. Ct., Iowa, DILLON, J.)

In the New York Circuit, one decision is reported, not entirely in harmony with those above cited, but turning upon the construction of a law of New York in a point as to which it differs *in toto* from that of Connecticut.

A New York statute makes an unrecorded mortgage "absolute-"ly void as against the creditors of the mortgagor, and as "against subsequent purchasers and mortgagees in good faith," and the State Courts have construed the word *creditors* as applying only to judgment creditors, who had taken out executions. In Re *Collins*, 12 Nat. Bankr. Reg., 379, it was held by the Circuit Court, that an assignee in bankruptcy merely as such, and not representing any specific lien on the mortgaged property, could take no advantage from this statute. This decision would seem to be based on the peculiar law of that State, and to be inapplicable to a case arising in a State where every creditor has, until the commencement of proceedings in bankruptcy, a right, without any judgment or judicial order, to levy an attachment on the lands mortgaged, and where a trustee in insolvency can set aside the mortgage on a bill in Equity, without counting on any specific lien in favor of himself or any creditor.

A different view of the law of New York, under the same statute, was taken by the Circuit Court, in the Southern District of New York, in another recent case decided by the late Mr. Justice WOODRUFF, by whom the present cause was also decided in the Court below. We refer to the case of Re *Leland*, 10 Blatchford, 503, where the following language is used in reference to the failure to record the mortgage there in question.

"It is claimed that, because it is valid, without being properly "filed, as against the bankrupts, it is, therefore, good as against "their assignee in bankruptcy, and that no creditor but a judg- "ment creditor can impeach or deny its validity. If it were "material, it would be sufficient to say, that, in this case, it is "proved, that there are judgment creditors, and that the assignee "in bankruptcy is acting herein in their behalf, as well as in "behalf of all others. But the claim is erroneous, on a broader "ground. The proceedings in bankruptcy arrest the ordinary "proceedings of creditors to obtain judgments, and thereby to "secure an appropriation of the debtor's property to their use, "and the assignee in bankruptcy represents them. He is trustee "for them; and, whatever right they might assert as creditors, "if they had obtained judgments, he may, for their benefit, as- "sert, whether it be to set aside conveyances by the bankrupts, "which are fraudulent and void as against creditors, or which "are otherwise, as against them, invalid."

This statement of the law has been, within a few months, quoted and re-affirmed in the case of *Barker* vs. *Smith*, 12 Nat. Bankr. Reg., 474, by the Circuit Court in Louisiana, held by Mr. Justice Woods, who adds,

"It would appear that an adjudication of bankruptcy removes "the necessity for a lien or judgment before a bill can be filed "to subject the property fraudulently conveyed, or when the "transfer is for other reasons invalid. If the rule were other- "wise, then no property conveyed by a bankrupt in fraud of his "creditors, or by any void or invalid conveyance, unless the "creditors had reduced their claims to judgment, could be sub- "jected by the assignee in bankruptcy, to the payment of debts. "For after an adjudication of bankruptcy no creditor, whose "debt is provable, is allowed to prosecute to final judgment any "suit at law or in equity therefor against the bankrupt, until the "question of the bankrupt's discharge shall be determined. "Bankrupt Act, Section 21."

IV.

We respectfully submit, in conclusion, that if this mortgage is upheld, as against assignees in bankruptcy, a wide door will inevitably be opened to every kind of fraud. Every insolvent debtor will have it in his power to create, in favor of his broker or his brother-in-law, as a "trustee," an apparent mortgage lien to any amount, purporting to be for an absolute indebtedness, but on no other consideration, in fact, than an indefinite expectation that the mortgagee may by its aid, at sometime thereafter, raise money, or its equivalent, for the benefit of the insolvent, or lend him money himself. Such were the only terms "definitely "agreed on" between mortgagor and mortgagee in this case, as is expressly found in the agreed statement of facts, (Record, page 11). It was this "baseless fabric of a vision" that they put in the apparent form of a liquidated debt for $50,000 in favor of a trustee. No case has yet gone so far as to sustain such a transaction, except perhaps as between the immediate parties to it, or mere volunteers claiming under them. It was voidable by proceedings in insolvency under the State law, and we submit that the Bankrupt Act ought not to receive a construction less favorable to creditors or their representatives.

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